No. 08-1089

IN THE

Supreme Court of the United States

JEFFREY WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition follows appeals from an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), in which the parents alleged a denial of a free appropriate public education (FAPE) because, *inter alia*, the school district's Individualized Education Program (IEP) did not offer occupational therapy (OT) services to the student despite uncontroverted evidence that the student needed such services to receive educational benefit.

The question presented is whether a court may look beyond the four corners of a student's IEP in determining which special education and related services were offered by an educational agency pursuant to 20 U.S.C. § 1414(d)(1)(A)(i) to satisfy its obligation to offer FAPE pursuant to 20 U.S.C. § 1414(d)(2)(A). The Sixth Circuit answered in the affirmative; the Fourth, Ninth and Tenth Circuits have disagreed.

LIST OF PARTIES

The parties to the appeal are Jeffrey Winkelman, Sandee Winkelman, and Jacob Winkelman, and the Parma City School District.

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JURISDICTION

The judgment to be reviewed was entered in the United States Court of Appeals for the Sixth Circuit on October 2, 2008; an extension of time to March 2, 2009 was granted by Associate Justice John Paul Stevens. Jurisdiction for this petition is predicated upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

20 U.S.C. § 1414(d)(1)(A)(i):[1]

In general. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

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[1] A comparison of IDEA 2004 (in effect July 1, 2005) with IDEA 1997 (in effect at the time of the underlying hearing) indicates that the sections referenced herein were not modified by the 2004 reauthorization.

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports,

concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI) (aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the

age of majority under section 1415(m) of this title.

20 U.S.C. § 1414(d)(2)(A):

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

STATEMENT OF THE CASE

Jacob was born in May 1997, and spent most of his first year in the hospital, suffering from a variety of ailments, including apnea, choking spells and pneumonia. JA 285-86.[2] Jacob was missing developmental milestones as he approached the age of two. The Winkelmans have another child who suffers from autism; based upon their experiences with that child, they correctly concluded that Jacob would need to be tested and likely provided an IEP. JA 287. To this end, the Winkelmans began working with the School District to have a multi-factored evaluation ("MFE") conducted and an IEP prepared and to have Jacob begin pre-school at the age of three. JA 288. At about the same time (in 2000), Jacob began seeing Dr. Morris Levinsohn, a pediatric neurologist. JA 212.

Initially, Jacob was placed at Parma Preschool, a public school operated by the School District. JA 288. The Winkelmans soon recognized that the Parma Preschool was not set up to provide for a child with Jacob's needs. The teachers did not appear to be trained adequately and the preschool personnel did not communicate at all with the Winkelmans regarding Jacob. JA 289-94, 296-97. The Parma Preschool's inability to provide Jacob with a suitable education was most evident during a scheduled observation by Mrs. Winkelman:

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[2] Citations to "JA" refer to the joint appendix filed in the court of appeals.

> All of a sudden, we were talking, the teacher and I, and I noticed the children were lining up, and there was no Jacob. I said where is Jacob, and she goes, oh, I know where he is. He had a routine he did, and it was hiding in a tunnel in the back of the gym. So, she pulled him out by his feet, and took him by the arm pits and by the heels, she dragged him to the front of the line while he is screaming, and then the children as a procession followed this screaming child back into the classroom. Basically, this was his routine.

JA 292-93. As a result, the Winkelmans asked the School District to transfer Jacob to a school that could provide the necessary services for him. JA 295.

I JACOB BEGINS ATTENDING ACC

In July 2001, the Winkelmans and the School District's IEP team agreed to remove Jacob from the public school and place him in the Achievement Center for Children—East (the "Achievement Center" or "ACC"), an intensive therapeutic program for children with autism. JA 296- 98, 471. The Winkelmans were particularly pleased that "everything [at ACC] was set up as an autistic classroom. It had all the supports. It had a lot of visuals. The staff seemed well trained[.]" JA 295-96. The School District agreed that the Achievement Center, and not one of its public schools, was the appropriate placement for Jacob. JA 302. Jacob continued in preschool at the Achievement Center through the 2002-03 school year. JA 299. During this time, the Winkelmans and the School District agreed upon the services to be included in

Jacob's IEP, including occupational therapy, speech therapy and music therapy. JA 303.

ACC offered a significantly different environment and services than those available in Parma's public school classrooms. For example, the public school had one teacher and one aide for each class of eight to ten children; the Achievement Center had one teacher, three therapists and two aides for each class of four to six children. JA 302-03. The public school did not offer music therapy. JA 303. Put simply, "[the Achievement Center] would tell me [(Mrs. Winkelman)] what I could do to help Jacob be more successful whereas Parma would be asking me what I can tell them to do. So I didn't feel like I [had] any support system. I had a lot of support with Achievement Center." JA 304.

II JACOB IS DETERMINED TO NEED OCCUPATIONAL THERAPY

As early as January 2003, the several months-long process to develop Jacob's IEP for the 2003- 04 school year (the "2003/04 IEP"), his first in kindergarten, had begun. JA 304. As a part of this process, a multi-factored evaluation (MFE) was conducted to assess Jacob's needs. The MFE appraised Jacob's needs for occupational therapy, as well as many other special education and related services.

Since the age of two, Jacob has been recommended for occupational therapy. JA 287-88; see also JA 319-20, 213-14, 223-24 (noting that private occupational therapists indicated that Jacob was

missing milestones). In January 2003, as a part of the MFE, the School District ordered a new "assessment" of Jacob's occupational therapy needs. JA 47. Maria Llerena, an occupational therapist, provided a Final Summary of her assessment (dated May 6, 2003), in which she "highly recommended" that Jacob continue to receive occupational therapy services. JA 350. Jacob's teacher at the Achievement Center noted that occupational therapy had been working for Jacob and that, at the end of the 2002-03 school year, Jacob was making great progress toward reaching some of his goals. JA 186. Jacob, however, was only at the beginning stages of developing those skills, and he needed additional occupational therapy to develop them fully. *Id.*

III DISCUSSIONS WITH THE SCHOOL DISTRICT BEFORE DEVELOPING AN IEP

On May 6, 2003, the MFE, which found that Jacob continued to need occupational therapy, was completed, and the School District met with the Winkelmans to discuss it. At that meeting, the School District acknowledged that Jacob continued to have deficits in several areas of development associated with autism spectrum disorder. JA 11-12; see also JA 103-04. In the "Team Summary and Interpretation of the Multifactored Evaluation" that the School District prepared and signed, the School District, relying to some degree on Dr. Levinsohn's recommendations, noted that Jacob continued to need occupational therapy services, among others. *Id.* That same day, the Winkelmans and the School District met to discuss the services that the School District would

provide Jacob during the summer of 2003. JA 469-75. As of May 6, 2003, the School District agreed that Jacob needed occupational therapy, and that the OT services would have to be provided for Jacob through the summer at the Achievement Center. JA 473. With regard to placing Jacob at the Achievement Center, rather than a public school, the School District admitted: "Jacob requires specialized supports for behavior and academics that aren't available in a public school setting." JA 475. Also at that time, the School District was going through a transition—a new superintendent had been hired, and there were preliminary discussions about the possibility of a program within the public schools that would cater to students with autism. JA 304. By June 2003, however, it became clear that the program would not be ready for the 2003-04 school year and that, instead, the Winkelmans and the School District jointly should develop an IEP that would permit Jacob to continue to make the progress that he had shown at the Achievement Center.

IV THE 2003/04 IEP

The Winkelmans met with the School District on June 2, 2003, to formulate an appropriate IEP for the upcoming school year. In preparation for this meeting and with the hope of working with the School District to prepare an IEP at it, the Winkelmans outlined the services that Jacob had been receiving and continued to need, including occupational therapy. JA 517-18. At the meeting, no one contested that Jacob's needs remained the same. JA 323. In particular, Jacob had received 90 minutes per week of direct occupational therapy services, and 15 minutes

per week of consultative OT services. JA 473. In an assessment dated May 6, 2003, the ACC occupational therapist "highly recommended" continuing OT services for 2003/04. JA 351.

The IEP Team, however, seemed oblivious to Jacob's actual needs. Instead of using the 2003 MFE and the IEPs from prior years as a basis for working with the Winkelmans to create the 2003 IEP at the June 2, 2003 meeting, the school district staffers on the IEP Team presented the Winkelmans with an apparently predetermined 2003/04 IEP that called for Jacob to be educated at Pleasant Valley Elementary School, a public school within the School District. JA 305-09. Notably, the 2003 IEP that the district staff demanded the Winkelmans sign did not contain many of the fundamental services that Jacob needed and had been receiving under the prior IEPs to which the IEP Team had agreed. Most significantly to this petition, under the 2003 IEP, there was no commitment to provide any occupational therapy. JA 110-125. Rather, the 2003 IEP stated: "OT-Sensory (as part of FBA) assessment to be completed by: Sept. 30, 2003." JA 115.

The IEP Team refused even to address the proposal prepared by the Winkelmans. JA 307-08. The School District's IEP "appeared to [be] specifically designed to the classroom that Parma had available and wanted to place Jacob in rather than being specifically designed to meet Jacob's special educational needs." JA 12. Shortly after the June 2 meeting, the School District presented the Winkelmans with a "Written Notice to Parents" ("Written Notice"), confirming that the School District was going to change the services that the School

District previously had agreed to provide Jacob. JA 514-15. The Written Notice also confirmed that no additional "assessment" had been completed by the School District since the MFE (that was completed just one month earlier) to justify this change. *Id.*

V THE WINKELMANS REJECT THE 2003/04 IEP AS INAPPROPRIATE

When it became clear that neither Pleasant Valley nor the IEP offered by the School District was appropriate for Jacob's needs, the Winkelmans decided to place Jacob at a private school, the Monarch School for Children with Autism ("Monarch"). JA 311. After visits to several other programs and discussions with Judy Hudgins, supervisor of special education for the School District, the Winkelmans chose Monarch because it was suited to meet Jacob's needs and there was a natural transition to it from the Achievement Center. JA 310, 312, 321; see also JA 228. As Mrs. Winkelman testified:

> From everything I have learned and know about autism, these younger years are the most critical, and the interventions need to be intense, and they need to be highly structured, and Jacob needs to develop certain things for him to be able to go on further because if he doesn't have the beginning blocks, they're never ever going to end up to be a ladder for him to build on.
>
> So, I just feel he is so far behind right now in many ways; milestones, language, the

> behavior interference with this learning, that it is important that he's in a place that he can have his needs met and he can succeed[.]

JA 316. Although the Winkelmans' immediate goal was to continue to build on Jacob's success at the Achievement Center by enrolling him at Monarch, their "ultimate, ultimate end result [was] to bring Jacob back to Parma [public school]." JA 314-15. At the same time that Jacob was enrolled at Monarch, the Winkelmans filed for a due process review of the School District's failure to provide Jacob with a FAPE.

VI THE ADMINISTRATIVE PROCEEDINGS AND LOWER COURTS

By letter dated June 2, 2003, the Winkelmans requested an impartial due process hearing pursuant to their procedural rights under the Individuals with Disabilities Education Act. JA 352. The parents expressed disagreement with Parma's IEP, alleged a denial of free appropriate public education (FAPE), and requested that Jacob be placed in a specialized program for children with autism. *Id.* Joy M. Freda was appointed impartial hearing officer (IHO), and after a four- day hearing, issued a decision in favor of the school district. JA 536. The parents appealed to a state-level review officer (SLRO), Theresa L. Hagen, who upheld IHO Freda's decision. JA 590. By summons and complaint filed July 15, 2004, the parents sought federal judicial review of SLRO Hagen's decision. JA 9. On June 2, 2005, U.S. District Judge John M. Manos upheld the SLRO's decision,

and by memorandum decision issued on October 2, 2008, the Sixth Circuit affirmed Judge Manos' order. App. A4-A31 (district court), App. A1-A4 (court of appeals). The Winkelmans earlier had taken an interlocutory appeal as to whether they could proceed *pro se* in federal court under IDEA, and prevailed on that issue in this Court. *Winkelman v. Parma City School District*, 550 U.S. 516 (2007).

VII JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the United States District Court for the Northern District of Ohio was predicated upon 20 U.S.C. § 1415(i)(3), and jurisdiction in the court of appeals was predicated upon 28 U.S.C. § 1291.

REASONS TO GRANT CERTIORARI

I THE OCCUPATIONAL THERAPY SERVICES AT ISSUE

"At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program[.]" 20 U.S.C. § 1414(d)(2)(A). The IEP must contain: a statement of the child's present levels of educational performance; a statement of measurable annual goals, including short-term instructional objectives; a statement of the special education and related services and supplementary aids and services that the child will receive (including the projected date for the beginning of the services and the anticipated frequency, location, and duration of the services); and a statement of how the child's progress toward the annual goals will be measured. See 20 U.S.C. § 1414(d)(1)(A).

The school district does not appear to dispute that Jacob needs occupational therapy in order to make "educational progress." See, e.g., JA 213–14, 223–24 (Dr. Levinsohn offering his "firm medical recommendation" that Jacob receive one-on-one occupational therapy in order for him to succeed in a school setting); JA 186 (Jacob's teacher at the Achievement Center noting that Jacob was making "great progress" in reaching some of his occupational therapy goals, but that he was just at the beginning stages of developing those skills); 411 F. Supp. 2d at 729 (App. A17) (district court: IEP "also indicates that occupational therapy is a necessary related service"); compare 20 U.S.C. § 1401(26)(A) (occupational therapy

is specifically included within the definition of "related services"). The 2003/04 IEP, however, does not contain any obligation for the school district to provide Jacob with occupational therapy services during the 2003-04 school year. See generally JA 110-125 (IEP); see also Memorandum of Opinion of Judge John M. Manos (June 2, 2005, at 10 ("The parties agree that Jacob's 2003-04 IEP did not contain specific goals and objectives for occupational therapy"), App. A15.

To the contrary, the 2003/04 IEP only stated: "OT-Sensory (as part of FBA) assessment to be completed by Sept. 30, 2003." See JA 115 (IEP). As a practical matter, then, the School District could decide on (or after) September 30th (one month or more after Jacob already would have languished without any occupational therapy services) that it would provide only a subset of occupational therapy services that Jacob needs, or that it would not provide any occupational therapy services at all. Congress could not have intended for such a wait-and-see approach, where children's needs are neglected under inadequate IEPs, and, as here, where the school district responsible is not held accountable. Certainly, Congress would not condone these egregious circumstances.

In January 2003 and as a part of the MFE, the School District ordered a new assessment of Jacob's occupational therapy needs, including by observation and direct assessment. JA 47. With the School District's consent, Maria Llerena, an occupational therapist, conducted the assessment of Jacob's fine motor and sensory skills and self-care needs based on observation, record review, interviews and direct assessment. JA 59. As a part of this assessment, in

April 2003, Jacob was tested and a Sensory Profile was prepared. JA 530-35, 523-29. (Sensory Profile dated April 10, 2003). The Final Summary of this assessment (dated May 6, 2003) states that

> it is highly recommended that Jacob continue to receive support from occupational therapy at school as well as other therapies to ensure that activities are being adapted to best fit his learning style, address his sensory diet needs and establish modifications in the environment as needed.

JA 351.

Based on Ms. Llerena's report, the school district's Team Summary and Interpretation of the Multifactored Evaluation stated that Jacob continued to need occupational therapy. JA 103-04. That same day and again based on Ms. Llerena's assessment, the School District agreed that Jacob needed occupational therapy during the summer of 2003. JA 473. Yet when the time came to prepare the 2003/04 IEP only one month later, the School District ignored Ms. Llerena's assessment and wanted to conduct its own "assessment" after the school year started. JA 306-07. Inexplicably, Julie Peacock, Parma's occupational therapist, attributed the inability to conduct the assessment previously to "scheduling conflicts," even though the process had begun as early as January. JA 278-79. Moreover, the assessment described by Ms. Peacock (that the school district wanted to conduct) was nearly identical to that already conducted by Ms. Llerena. JA 275.

Under these circumstances, it is clear that the School District violated the mandates of the IDEA. *Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989) (ruling that a school district did not provide a FAPE where the IEP did not "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"). The District Court erroneously sought to characterize this inadequacy as a procedural violation so minor that it could be excused. See Memorandum of Opinion of Judge John M. Manos (June 2, 2005), at 10-14, App. A15-A24. As set forth above, however, this was not a mere procedural violation. To be clear, the 2003/04 IEP stated only that an OT-Sensory assessment would be completed by the end of September; the 2003/04 IEP does not address what services, if any, would be provided to Jacob after that assessment or, if services would be provided, then when they would begin. The district court, like the administrative officers, mistakenly assumed that because an assessment was guaranteed, the necessary occupational therapy services likewise were guaranteed.

Within the four corners of the 2003/04 IEP, no such guarantee was made. Such uncertainty as to whether services would be provided at all (not to mention as to when they would commence, along with frequency and duration of service) is not a mere procedural violation, but rather a substantive one. As set forth above, the failure to include any details regarding the occupational therapy services that Jacob would receive, including whether he would receive any services at all, denied Jacob an adequate IEP and an opportunity to progress, thereby entitling the Winkelmans to relief.

II THE SIXTH CIRCUIT'S DECISION

The court of appeals in the instant case essentially adopted the district court's reasoning, stating that the district court's opinion "correctly sets out the applicable law and correctly applies that law to the facts in the record. The issuance of a full written opinion by this court would serve no useful purpose." As such, review of the district court's reasoning is necessary. *Winkelman v. Parma City School Dist.*, 411 F. Supp. 2d 722, 729–31 (N.D. Ohio 2005); reproduced herein at App. A4-A31.

The district court found that

> Jacob's 2003–04 IEP identifies his present performance levels for occupational therapy. It also indicates that occupational therapy is a necessary related service. (Parma's Ex. K before IHO, at 157). However, instead of providing annual goals, short-term objectives, and *a description of the services to be provided*, it only recommends that Jacob be assessed for occupational therapy within the first month of the new school year.

411 F. Supp. 2d at 729 (App. A19) (emphasis added). The district court's reference to IEP lacking a "description of the services to be provided" obscures the fact that, under this IEP, *no* occupational services were to be provided; the *only* obligation for the school district was to complete an "OT-Sensory" assessment (as part of a functional behavioral assessment) by September 30, 2003. JA 482 (6/2/03 IEP). The district court, then, relied on extrinsic evidence—the testimony of school district employee Julia Peacock—

in support of its conclusion that goals and objectives would be written, and his (implied) conclusion that the school district was in fact offering OT services as part of Jacob's program. 411 F. Supp. 2d at 729–30 (App. A17-A22).

The current approach in the Sixth Circuit to determining whether an IEP should be evaluated within its four corners *or not* seems to boil down to a fact-specific analysis. The district court compared two Sixth Circuit decisions on their facts, *Defendant I* and *Boss*. *Cleveland Heights-University Heights City School Dist. v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998). In *Boss*, that circuit distinguished *Defendant I* on its facts, finding that in *Defendant I*, "the student's parents asked the school to wait until November to develop an IEP so their child would have an opportunity to adjust to the new experience of middle school 'on his own.' " while in *Boss*, the "parents did not ask the District to delay preparation of an IEP until after the school year started. Rather, it was the District that indicated it would not take further steps until after the school year started." *Id.*

The district court found "the present situation is more akin to the situation in *Defendant I* than in *Boss*." That court stated that while the Winkelmans were aware that no OT was provided in the IEP (what the district court calls "absent information"), "they did not object to the implementation of services."[3] The

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[3] The suggestion that the parents did not object to the 2003/04 IEP is ludicrous, as evidenced by the unilateral placement, the due process hearing request received three days after the final IEP meeting (JA 353), and the litigation culminating in this petition for

opinion also states that "the reason for the delay was to allow Jacob time to adjust to his new school environment" and "unlike the three month delay in *Boss*, Parma agreed to re-assess Jacob within the first month of the new school year." 411 F. Supp. 2d at 731 (App. A21).

Needless to say, this analysis does not accord with *Union v. Smith*, in which the Ninth Circuit stated "a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." 15 F.3d at 1526.

III THE CIRCUIT SPLIT

The "four corners" rule that the petitioners will urge upon the Court was first articulated by the Ninth Circuit in 1994. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994). That court of appeals held that

> a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents

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certiorari. The parents did check a box providing consent for the school district to deliver the services in the IEP (JA 487), but such a consent in no way can be construed as agreement that the IEP is appropriate. And see JA 546 (IHO decision, ¶ 37: Parent and district "couldn't agree on how much he needed, what he needed, why he needed it.")

expressed unwillingness to accept that placement. The IDEA explicitly requires written prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. See 20 U.S.C. § 1415(b)(1)(C). The Supreme Court has explained the great importance of such procedural components of the IDEA. "When the elaborate and highly specific procedural safeguards embodied in § 1415 [of the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." [*Hendrick Hudson Cent. Sch. Dist. Bd. of Ed. v.] Rowley*, 458 U.S. at 205, 102 S.Ct. at 3050 [(1982)].

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). For

> example, in this case, a formal offer of McKinnon would have served several purposes. It would have alerted the Smiths to the need to consider seriously whether McKinnon was an appropriate placement under the IDEA. The Smiths could not have been reimbursed for their unilateral placement of Bernard at the Clinic if McKinnon were an appropriate placement. Also, if a formal offer were made, the Smiths could have decided whether to oppose McKinnon or to accept it with the supplement of additional education services. Finally, by making a formal offer, the District would have been more prepared to introduce sufficient relevant evidence to the Hearing Officer of the appropriateness of McKinnon as a placement for Bernard.

15 F.3d at 1526. This rule has been adopted by the Fourth Circuit in various cases. See, e.g., *A.K. v. Alexandria City School Bd.*, 484 F.3d 672, 681–82 (4th Cir. 2007) *cert. denied* 128 S.Ct. 1123 (2008) ("In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself"); *County School Bd. of Henrico County, Virginia v. Z.P.*, 399 F.3d 298, 306 n. 5 (4th Cir. 2005) ("The School District complains that the hearing officer ignored the fact that an aide was hired for Z.P. after the IEP was written. We believe that the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP"). Likewise, the Tenth Circuit has expressly adopted the "four corners" rule. *Sytsema v. Academy School Dist. No. 20*, 538 F.3d 1306, 1315–16 (10th Cir. 2008) ("Based on the Act and

the relevant case law, we conclude that the court should consider only the written IEP during its review").[4]

The Seventh Circuit has trod a different path, holding that "the court should find it unnecessary to go beyond the four corners of the document in order to make that determination. However, vagueness in the instrument with respect to how its goals are to be achieved *may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan.*" *John M. v. Board of Educ. of Evanston Tp. High School Dist. 202*, 502 F.3d 708, 715–716 (7th Cir. 2007) (emphasis added). That court of appeals relied upon a Sixth Circuit case as persuasive authority that a decision-maker may find occasion to venture past the bounds of the written

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[4] In addition, the Tenth Circuit "recognize[d] that with this determination we are splitting with the First Circuit's holding in *C.G. ex rel. A.S. v. Five Town Community School District*, 513 F.3d 279, 286 (1st Cir. 2008). There, the First Circuit held that if parents obstruct an IEP development process, then a reviewing court must be able to consider evidence extrinsic to the written IEP. *Id.* Although we understand the First Circuit's rationale, we conclude that the statute's language and the policy concerns raised above trump the reasons underlying the totality of the circumstances review the court adopted in *Five Town*. Further, this bright-line rule should not disadvantage a diligent school district because it is always able to tender to recalcitrant parents a final IEP that incorporates any rejected oral offers that it may have extended during the consultative process." 538 F.3d 1316 n. 9.

IEP to determine the program offered to parents. *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990).

In *Defendant I*, the IEP contained "no reference to his present educational performance" and none to any "objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether instructional objectives are being achieved[.]" 898 F.2d at 1190. The Sixth Circuit acknowledged that such an IEP violated IDEA, but held that an IEP need not include all the mandated information within its four corners to pass statutory muster and provide FAPE. *Id.* According to the Sixth Circuit, the four corners rule would "exalt form over substance." *Id.* The district court in the case at bar relied almost entirely upon *Defendant I* in finding that the absence of OT services within its four corners did not render the IEP invalid. *Contra Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir. 2001) (oft-cited Sixth Circuit case endorsing four corners rule); but compare *Sytsema*, supra, 538 F.3d at 1316 (accurately describing *Knable* analysis as *dicta*).

IV THE IMPORTANCE OF THE ISSUE

Unlike the Sixth Circuit, which found that the omission of an undisputedly necessary service from an IEP to be merely a "technical" error, the Ninth Circuit has held that such lapses are "not merely technical[,]" but rather subject to rigorous enforcement. *Union v. Smith*, *supra*, 15 F.3d at 1526. The Ninth Circuit's rule ensures "a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

Furthermore, a formal, specific offer from a school district will greatly assist parents in 'present[ing] complaints with respect to any matter relating to the ... educational placement of the child.'" *Id.*, quoting 20 U.S.C. § 1415(b)(1)(E).

Indeed, in this case just such a troublesome factual dispute emerged. As the district court described, the IHO "found Ms. Peacock to be a very credible witness who wanted to set new goals for Jacob reflecting his current levels of performance within the scope of his new environment" and "agreed that 'the assessment of [Jacob's] abilities and adaptation to his new environment are the most important factors in the creation of appropriate goals and objectives.'" 411 F. Supp. 2d at 730 (App. A19). She also found that "measuring Jacob's level of adaptation to his new school environment required Ms. Peacock to first observe him in his new environment, thus justifying the delay." *Id.* Third, she concluded that Jacob's motor skills were on par with the majority of motor skills required for kindergarten-readiness, and he thus would not be significantly impacted by the thirty-day delay. Rather, she found that "the overall impact on the child's long-term progress may be greater with the development of goals and objectives based on timely data and tailored to the child's unique needs." *Id.* (emphasis added).

Notably, *nothing* in the record guarantees that Jacob would have been provided any OT services whatsoever during 2003/04; the district judge (and the state officers) simply glossed over this significant omission, *assuming* that the school district would repair this lapse following an evaluation by Ms. Peacock. The lower courts' reliance on Ms. Peacock's testimony raises several significant issues.

First, and most significantly, the decision as to what OT services are offered is to be made by the IEP Team, and not by just one member of the team. See, e.g., 34 300.343(c) (July 1, 2003 update) ("Each public agency shall ensure that the IEP team . . . Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and ... Revises the IEP as appropriate to address— ... Any lack of expected progress toward the annual goals described in Sec. 300.347(a), and in the general curriculum, if appropriate;... The results of any reevaluation conducted under Sec. 300.536; ... Information about the child provided to, or by, the parents, as described in Sec. 300.533(a)(1); ... The child's anticipated needs; or ... Other matters"). Thus, anything Ms. Peacock stated as to future intentions of the IEP Team represented only an educated guess as to what the consensus of the team might be. This highlights the importance that the IEP Team express its offer to the parents in writing, in the form of an IEP; a judicial decision endorsing the practice of having individual members of the team testify as to additional services, not included in the IEP, that the IEP Team could also offer in the future, invites a school district to fill up the record with pages of speculation by school district employees in an effort to rehabilitate an inappropriate IEP.

Second, IDEA requires prior written notice when a school district proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3). Allowing a school district to augment the offered services through *post hoc* testimony completely abrogates this requirement.

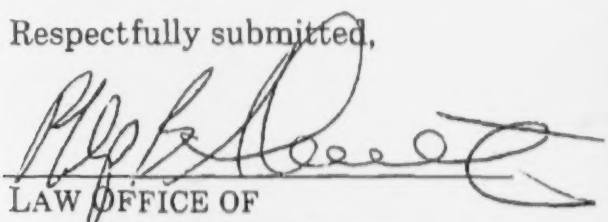
Third, as the Ninth Circuit noted, a strictly applied four corners rule assists parents in presenting due process complaints under IDEA. 20 U.S.C. § 1415(b)(6). In cases such as this, a reimbursement case, the parents must typically decide, at least ten business days prior to removal of the child from the public school, whether they wish to unilaterally place the child and make a claim for tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb). A parent should be entitled to rely upon the written IEP at hearing and in court to prove a denial of FAPE after assuming the risk of the unilateral placement. See, e.g., *Burlington*, 471 U.S. at 373-74 ("While we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3)"). Allowing individual school district employees to testify as to other services, not listed on the IEP, to supplement the "offer" unfairly shifts the goalposts and permits the school district to bait a parent into a unilateral placement with a parsimonious IEP, then fight off reimbursement by testifying as to the generous services it later claims *would have* been offered. Such a rule would essentially gut the holding of *Burlington*, and clearly runs counter to the intent of Congress in codifying that holding in the current reauthorization of IDEA. See 20 U.S.C. § 1412(a)(10)(c)(ii).

CONCLUSION

Based on the foregoing, petitioners respectfully request that the Court grant certiorari to the United States Court of Appeals for the Sixth Circuit and entertain the merits of this case.

Dated: Amherst, New York
February 25, 2009

Respectfully submitted,



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APPENDIX

No. _____

IN THE

Supreme Court of the United States

JEFFREY WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TO APPENDIX

A1

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 05-3886

FILED
OCT 0 2 2008
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ON APPEAL FROM
THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF OHIO

JEFF WINKELMAN, et al.,)
Plaintiffs-Appellants,)
v.)
PARMA CITY SCHOOL DISTRICT,)
Defendant-Appellee.)
)

BEFORE: SILER, BATCHELDER, and ROGERS, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. The parents of an autistic child sued their local school district, alleging that the school district had failed to provide a "free appropriate public education" (FAPE) in accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, and seeking remuneration for doing so themselves, as well as a

court order directing the school district to do so in the future. Both parties moved for judgment on the administrative record and the district court ruled for the school district. The parents appealed.

The district court had allowed the parents to proceed *pro se,* but when the case reached this court on appeal, we ordered the parents to obtain counsel, lest their appeal be dismissed. Instead, they petitioned the Supreme Court for certiorari, which the Court granted. Ultimately, the Court held that parents have rights under IDEA independent of the rights of their child, the parents' rights encompass the child's right to a FAPE, and the parents may proceed pro *se* on their own independent rights. On remand, we are again presented with the merits questions.

The Winkelmans first argue that the district court erred by placing the burden of proof on [2] them, rather than on the school district. Next, they argue that the district court erred by finding that the school district had provided the FAPE with regard to music therapy, occupational therapy, and speech therapy. Finally, they contend that the district court erred by approving the hearing officer's decision to disregard the Winkelmans' expert-witness's testimony as not credible.

After carefully reviewing the record, the law, and the arguments presented in the appellate briefs, we conclude that each of the Winkelmans' assignments of error is without merit, and that the district court's opinion, *Winkelman v. Parma Cty.*

Sch. Dist., 411 F. Supp. 2d 722 (N.D. Ohio 2005), correctly sets out the applicable law and correctly applies that law to the facts in the record. The issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinion, we **AFFIRM.**

A4

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 1:04CV1329

Judge John M. Manos

MEMORANDUM OF OPINION

JACOB WINKELMAN, ET AL.,)
Plaintiffs,)
)
vs.)
)
PARMA CITY SCHOOL DISTRICT,)
Defendant.)

On March 2, 2005, Plaintiffs, Jeff, Sandee, and Jacob Winkelman (collectively, the "Winkelmans") filed a Motion for Judgment on the Pleadings Based on the Administrative Record.[1][2](Docket No. 35.) On March 17, 2005,

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[1] The Winkelmans actually filed a motion for summary judgment. However, because neither party has expressed a desire to supplement the record, a motion for summary judgment is inappropriate. Dong ex. rel. Dong v. Board of Educ., 197 F.3d 793, 798- 99 (6th Cir. 1999). Although the Winkelmans initially sought to supplement the record, their counsel clarified that the request was simply intended to bring to the

Parma City School District ("Parma") filed a Motion for Judgment on the Pleadings Based on the Administrative Record. (Docket No. 38.) The issue on appeal is whether or not Parma provided Jacob Winkelman with a free appropriate public education ("FAPE")[2] as mandated under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et. seq., and analogous state law, O.R.C. § 3323.01 et. seq. The Court has jurisdiction under 28 U.S.C. § 1331.

All issues have been fully briefed and are ripe for adjudication. For the following reasons, the Winkelmans' Motion for Judgment on the Pleadings Based on the Administrative Record is **DENIED** and Parma's Motion for Judgment on the Pleadings Based on the Administrative Record is **GRANTED**.

Court's attention new Sixth Circuit case law. Thus, because the Winkelmans believe that all the necessary facts are set forth in the administrative record, (Brief, Docket No. 35, at 5), the Court will construe their motion as one for judgment based on the administrative record. See id. at 799.

[2] A "free, appropriate public education" consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982).

I. FACTUAL BACKGROUND

Plaintiffs are Jacob Winkelman, a seven-year old boy diagnosed with autism, and his parents, Jeff and Sandee Winkelman. In July of 2001, Jacob attended preschool at the Achievement Center for Children ("Achievement Center"). Parma paid for this program because Jacob did not respond well to its own program. Achievement Center offers a special education intervention program including physical therapy, occupational therapy, speech therapy, and music therapy.

On September 1, 2001, Parma school officials met with the Winkelmans to discuss an [3] Individualized Education Program ("IEP")[3] for Jacob. The parties agreed that Achievement Center was an appropriate placement for the 2001-02 and 2002-03 school years.

On June 2, 2003, the parties met to discuss Jacob's IEP for the 2003-04 school year. The 2003-04 IEP proposed educating Jacob in a special education classroom at Pleasant Valley Elementary School ("Pleasant Valley"). Pleasant Valley is a public school that offers speech and occupational therapy and would provide Jacob with an opportunity to interact with six other students with

---

[3] An "individualized education program" details the services "tailored to the unique needs of the handicapped child." Rowley, 458 U.S. at 181.

varying disabilities. The educators at Pleasant Valley are trained to educate children with autism.

The Winkelmans were unhappy with the proposed 2003-04 IEP. Specifically, they complained that the proposed 2003-04 IEP did not include music therapy, did not contain a sufficient amount of speech therapy nor one-on-one interaction, and did not contain any specific plan to implement the need for occupational therapy. Moreover, they preferred placing Jacob at Monarch School. Monarch School is a private school that specializes only in autism and emphasizes one-on-one interaction between students and educators with limited peer interaction. Nonetheless, the Winkelmans signed the proposed 2003-04 IEP and although they objected to his placement, they consented to the initiation services. (Parma's Ex. K before IHO, at 157.)

On June 2, 2003, the Winkelmans filed a request for a due process hearing with Impartial Hearing Officer ("IHO") Joy Freda alleging that Parma failed to provide Jacob with a FAPE. On August 27, 2003, IHO Freda issued an interim order designating Achievement Center as Jacob's stay-put placement. Nonetheless, the Winkelmans unilaterally pulled Jacob from that program and placed [4] him at Monarch School. Jacob performed well at Monarch School during the 2003-04 school year. However, because of the expense of private education, they did not enroll Jacob in Monarch School for the 2004-05 school year. Presently, Jacob is not enrolled at any school but does participate in a

one-to-two hour a week outreach program at Monarch School.

On February 25, 2004, IHO Freda issued a fifty-six page decision finding that Parma provided Jacob with a FAPE and thus, did not violate the mandates of the IDEA. The Winkelmans appealed to State Level Review Officer ("SLRO") Theresa L. Hagen. On June 2, 2004, she issued a forty-four page opinion affirming IHO Freda's decision.

On July 15, 2004, the Winkelmans appealed to this Court. On March 2, 2005, they filed the current motion for judgment on the pleadings based on the administrative record. They are seeking reversal of SLRO Hagen's decision and reimbursement for educating Jacob at Monarch School. On March 27, 2005, Parma filed the current motion for judgment on the pleadings based on the administrative record. It is seeking affirmance of SLRO Hagen's decision in its entirety.

II. LEGAL STANDARD

The IDEA's provision governing federal court review over state administrative decisions states: "the court (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(i)(2)(C). To prevail on the merits, a plaintiff must establish either that (1) the

state has not complied with the IDEA's procedural mandates, or (2) the proposed IEP is not reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 206-07.

[5]Procedural issues are strictly reviewed for compliance; although technical deviations will not render an IEP invalid. Dong, 197 F.3d at 800. Substantive issues are reviewed under a modified de novo standard: although the district court is required to make independent decisions based on the preponderance of the evidence, it must give due weight to the determinations made by state administrators. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 763-64 (6th Cir. 2001) (quoting Rowley, 458 U.S. at 206). Accordingly, the Supreme Court has cautioned that although the district court should not simply adopt the findings of fact of the state administrators without re-examining the evidence, it may not simply substitute its own notions of sound educational policy for those of the state hearing officers. Rowley, 458 U.S. at 206.

The burden of proof in the Sixth Circuit rests with the party challenging the terms of the IEP. Dong, 197 F.3d at 799. Here, the burden rests with the Winkelmans. They allege three procedural violations and three substantive violations.

III. LAW AND ARGUMENT

A. Procedural Violations

1. Use of Assistant

The Winkelmans argue that IHO Freda violated the procedures set forth in the IDEA by allowing another person to "co-preside" over the proceedings. However, nothing in the record suggests that IHO Freda's research assistant, Ann Oakar, co-presided over the proceedings. Also, nothing in the record suggests that either party objected to the use of a research assistant. To the contrary, IHO Freda's Disclosure Conference Memorandum specifically states that "[a]lso present was Ann Oakar, attorney, an invitee of the hearing officer after consent of both parties." (IHO Ex. 20, at 1) [6] (emphasis added). At the start of the hearing, IHO Freda again asked the parties if there were any procedural errors that might interfere with the proceeding and both parties responded, "no." (IHO Tr. at 14.)

The Winkelmans' citation to O.A.C. § 3301-51-08 is unavailing. Although O.A.C. § 3301-51-08 details the qualifications and duties of a hearing officer, it does not prohibit the use of a research assistant. Most telling, the Winkelmans are unable to cite a single legal authority that holds that a hearing officer is not allowed to employ a research assistant. Absent any evidence that Ms. Oakar somehow interfered with the process, the Court

concludes that the use of a research assistant by an impartial hearing officer does not constitute reversible error.

2. **Timing Delay**

The Winkelmans argue that because the administrative proceeding went 217 days beyond the 45-day deadline, the procedural requirements of the IDEA were violated. The Ohio Administrative Code, Section 3301-51-08 (G)(1)(a) states that "the Ohio Department of Education shall ensure that not later than forty-five days after the receipt of a request for a due process hearing [a] final decision is reached in the hearing." See also 34 C.F.R. § 300.511(a). Section 3301-51-08(G)(3) authorizes the IHO to grant extensions of time beyond the forty-five day requirement. See also 34 C.F.R. § 300.511(c). Section 3301-51-08(G)(3)(b) states that any "extension of time beyond the forty-five days at the request of either party pursuant to this rule shall not be considered a failure to meet timelines."

Here, the Winkelmans requested a due process hearing on June 5, 2003. Thus, the final decision, filed on February 20, 2004, was well beyond the 45-day deadline. However, the first [7] extension (30 days) was at the request of the Winkelmans so that they could retain counsel. (IHO Exs. 5 & 6.) The second extension (90 days) was at the request of both parties, jointly, so that they could resolve a stay-put placement issue and prepare for the due process hearing. (IHO Exs. 9 &

10.) The third extension (36 days) was, again, at the request of both parties, jointly, so that they could submit briefs. (IHO Ex. 31.) Thus, under the authority of O.A.C. § 3301-51-08 (G)(3)(b), these delays are not to be considered a failure to meet the 45-day deadline.

The fourth (7 days) and fifth (39 days) extensions were at the request of Parma to allow IHO Freda time to thoroughly consider the record, conduct research, and review the evidence. (IHO Ex. 31.) The Winkelmans did not join in these requests, nor did they offer an objection. Given the size of the administrative record, IHO Freda did not err in granting these two requests for additional time. As IHO Freda correctly stated when granting the last extension, Jacob "remains enrolled at Monarch School, the preferred placement of the parents, and is not adversely impacted by this delay." (IHO Ex. 31.) Although the Court does not condone the delay, the IDEA and the Ohio Administrative Code clearly provide some flexibility upon the filing of a motion for good cause. The Court concludes that all extensions were in response to a motion for good cause and that the delay does not constitute reversible error.

Moreover, the Winkelmans have not shown that the delay caused such substantive harm as to deny Jacob a FAPE. See Deal v. Hamilton County Bd. of Edu., 382 F.3d 840, 854 (6th Cir. 2005) (citing Knable, 238 F.3d at 764). The only harm alleged is financial: "[s]uch delay caused [Jacob's] parents to

use up all of their resources for providing [Jacob] with an appropriate education at the Monarch School, which has resulted in [Jacob] not having any services for extended school year [8] services for 2004 and not having any services for the 2004-2005 school year." (Brief, Docket No. 35, at 5.) However, when Jacob was enrolled at Monarch School, a place for him was available at the Achievement Center. In violation of IHO Freda's August 27, 2003 stay-put placement order, the Winkelmans unilaterally pulled Jacob from the Achievement Center and placed him at Monarch School. The Supreme Court has held that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." School Comm. of Burlington, Mass. v. Department of Educ. of Mass., 471 U.S. 359, 373-74 (1985). Thus, any financial harm suffered by the Winkelmans is a result of their own doing and not a result of IHO Freda's delay.

3. **Predetermination**

The Winkelmans argue that Parma predetermined to place Jacob in its own program prior to developing his 2003-04 IEP. The Sixth Circuit has held that predetermining not to offer a child certain services without effective participation by the parents amounts to a procedural violation of the IDEA and causes such substantive harm as to deprive the child a FAPE. See Deal, 392 F.3d at

855-59. However, the Winkelmans did not raise this issue with IHO Freda, nor with SLRO Hagen. District courts are not authorized to rule upon issues beyond those presented to the IHO and SLRO. Metropolitan Bd. of Pub. Educ. v. Guest By & Through Guest, 193 F.3d 457, 463 (6th Cir. 1999). As the Sixth Circuit reasoned, "[w]ere federal courts to set themselves up as the initial arbiters of the handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purposes of the Act." Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989). Parma has never had an [9] opportunity to defend itself against allegations of predetermination. Although the Court is authorized to hear new evidence, the Sixth Circuit is clear that new evidence cannot be heard on issues never presented to the IHO or SLRO. Guest, 193 F.3d at 463. Thus, the Court lacks jurisdiction to address this issue.

Even if the Court had jurisdiction, the administrative record does not support an allegation of predetermination. First, the Winkelmans were able to participate at every step of Jacob's education. They were present at the 2003-04 IEP meetings and consented to the initiation of services. (Parma's Ex. K before IHO, at 154.) Second, Parma readily paid to enroll Jacob at the Achievement Center when it was shown that Jacob was not responding well to its own program. Third, there is no evidence that Parma has a

predisposition against placing a child at Monarch School. Mrs. Winkelman did not even begin to consider Monarch School until after the June 2, 2003 IEP meeting. (Tr. at 81.) She also testified that Dr. Judith Hudgins, Parma's Special Education Supervisor, did not discourage her from looking into other programs. (Tr. at 47.) Finally, Susan Rueger, Pleasant Valley's principal, testified that Pleasant Valley would provide any service that Jacob's IEP required. (Tr. at 648-49.)

In short, this is a far cry from the situation in Deal where the Sixth Circuit found (1) numerous procedural and substantive errors, (2) that the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs, and (3) that the district's main concern was financial. 392 F.3d at 855-59. Indeed, in Deal, the parents were not even allowed to ask questions during the IEP meetings. Id. at 855. Thus, even if the Court had jurisdiction over this issue, the record does not support an allegation of predetermination.

[10] **B. Substantive Violations**

1. Occupational Therapy

The parties agree that Jacob's 2003-04 IEP did not contain specific goals and objectives for occupational therapy. Instead, it guaranteed to assess Jacob for occupational therapy and mandated that such assessment be completed

within thirty days of the new school year. The issue is whether or not a guarantee to assess Jacob for occupational therapy as opposed to setting forth specific goals and objectives constitutes a substantive violation and denies Jacob a FAPE.

An IEP is defined as a "written statement for a child with a disability that is developed, reviewed, and revised in accordance with section [1414(d)]." 20 U.S.C. § 1401(14). It must include:

> (1) a statement of the present levels of educational performance of the child, (2) a statement of annual goals, including short-term instructional objectives (3) a statement of the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs, ... (5) the projected date for initiation and anticipated duration of these services, and (6) appropriate objective criteria and evaluation procedures for schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

34 C.F.R. § 222.50 (2005); Cleveland Heights-University Heights City Sch. Dist. v. Boss by & through Boss, 144 F.3d 391, 398 (6th Cir. 1998). "Related services" include "transportation and such developmental, corrective, and other supportive

services ... as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26)(A). "Occupational therapy" is considered a "related service." Specifically, "occupational therapy" includes "(1) improving, developing or restoring functions impaired or lost through illness, injury, or deprivation, (2) improving ability to perform tasks for independent functioning if functions are impaired or lost, and (3) preventing, through early [11] intervention, initial or further impairment or loss of function." 34 C.F.R. § 300.24(5) (2005).

Here, Jacob's 2003-04 IEP identifies his present performance levels for occupational therapy. It also indicates that occupational therapy is a necessary related service. (Parma's Ex. K before IHO, at 157). However, instead of providing annual goals, short-term objectives, and a description of the services to be provided, it only recommends that Jacob be assessed for occupational therapy within the first month of the new school year. Id. at 145; 149. The Winkelmans consented to this portion of the IEP. Id. at 154.

Julia Peacock, Parma's occupational therapist, explained the reason for the delay:

> I was not comfortable writing IEP goals ... because I had never seen Jacob and was not comfortable writing goals on

> what the OT currently had goals on because they were things like tying his shoes which at five to six, you should be working on, but he shouldn't actually quite know how to do it yet. It would be good if he could. Cutting out squares and things like that, I really wanted to see where he was at before I put on goals. He might need harder goals, and I really wanted to look at where the problems were occurring instead of just putting on a goal. If it was a sensory problem we needed to attack it from more of a sensory issue and not just cutting on a line.
>
> . . .
>
> This was a new environment, and we weren't sure how he was going to transition. So, there was no point to putting that in until we knew how he did in the beginning and figured out how to modify the environment for him. ... [T]his is very typical; that we think it's best to do it when we get to know the child a little bit and he has been here for a while and we see how he is actually doing and what problems he is having.

(IHO Tr. at 297-98.)

Based on this testimony, IHO Freda concluded that the lack of specific goals and

objectives for occupational therapy constituted a procedural technical violation of the IDEA as opposed to a substantive violation. She provided four reasons to support her conclusion. First, she found Ms. [12] Peacock to be a very credible witness who wanted to set new goals for Jacob reflecting his current levels of performance within the scope of his new environment as opposed to simply recycling old goals. Second, she agreed that "the assessment of [Jacob's] abilities and adaptation to his new environment are the most important factors in the creation of appropriate goals and objectives." (IHO decision, at 48.) Obviously, measuring Jacob's level of adaptation to his new school environment required Ms. Peacock to first observe him in his new environment, thus justifying the delay. Third, she concluded that because Jacob's motor skills were on par with the majority of motor skills required for kindergarten-readiness, he would not be significantly impacted by the thirty-day delay. Rather, she found that "the overall impact on the child's long-term progress may be greater with the development of goals and objectives based on timely data and tailored to the child's unique needs." (IHO decision, at 49.) Finally, she noted that the Winkelmans consented to the initiation of services.

Two Sixth Circuit cases are instructive on this point. In Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990), the court held that an IEP that did not include present educational performance levels and objective criteria for determining whether

instructional goals were being met constituted a mere technical violation of the IDEA. The court reasoned that the absent information was known to all parties and that the parents had actually requested the delay so that their child could first adjust to the new experience of middle school. Id. at 1189. Also the court reasoned that emphasis should be placed on "the process by which the IEP is produced rather than the myriad of technical items that must be included in the written document." Id. at 1190.

However, in Cleveland Heights-University Heights City Sch. Dist. v. Boss by & through Boss, 144 F.3d 391 (6th Cir. 1998), the court held that an IEP that did not include objective criteria for [13] determining whether instructional goals were being met constituted a substantive violation of the IDEA and denied the child a FAPE. The court reasoned that the omitted information went to the heart of the substance of the IEP. Id. at 399. Moreover, unlike the situation in Defendant I, the parents refused to approve the IEP. Id. at 394. Also, unlike the situation in Defendant I, both state administrative officers ruled in favor of the parents. Id. at 398. Under the IDEA's deferential standard of review, federal courts are required to give these state administrative decisions due weight. Finally, the Sixth Circuit noted that the school district refused to reassess the IEP until three months after the school year had started. Id.

The Court concludes that the present situation is more akin to the situation in Defendant I than in Boss. First, the absent information was known to the Winkelmans and still, they did not object to the implementation of services. See e.g. Berger v. Medina City Sch. Dist., 348 F.3d 513, 520 (6th Cir. 2003). Second, both state administrative officers ruled in favor of the school district and their decisions require some deference. Third, the reason for the delay was to allow Jacob time to adjust to his new school environment. Finally, unlike the three month delay in Boss, Parma agreed to re-assess Jacob within the first month of the new school year.

The Winkelmans argue that affirming the decisions of the state administrative officers "will set a dangerous precedent allowing school administrators to place handicapped children in school without first developing the statutorily mandated goals and objectives and without first detailing the provisions for services to be provided." (Brief, Docket No. 35, at 13.) They raise a valid concern. Indeed, IHO Freda stated that identifying a needed service and then delaying the creation of goals and objectives is not the "preferred practice." (IHO Decision, at 48.) Nonetheless, the entire IEP team (with initial [14] consent by the Winkelmans) and both state administrative officers all agreed that the one month delay was in the best interest of Jacob. The Court must give these determinations due weight.

Knable, 238 F.3d at 763-64 (quoting Rowley, 458 U.S. at 206).

In doing so, the Court does not wish to make light of the procedural and substantive requirements of the IDEA. However, given that Jacob was entering a completely new school setting and given the overall consensus that the one-month reassessment was in his best interest, the Court concludes that the lack of goals and objectives for occupational therapy only constitutes a procedural technical violation of the IDEA and not reversible error. As the Sixth Circuit stated, to say that such technical deviations render an IEP invalid "is to exalt form over substance." Defendant I, 898 F.2d at 1190.

2. **Speech Therapy and Academics**

The Winkelmans argue that the reduction of speech therapy from 90 minutes to 60 minutes and the lack of one-on-one academic instruction constitutes a substantive violation of the IDEA and denies Jacob a FAPE.

"Speech-language pathology services" is considered a "related service" and includes "(1) identification of children with speech and language impairments, (2) diagnosis and appraisal of specific speech and language impairments, (3) referral for medical or other professional attention necessary for the habilitation of speech or language impairments, (4) provision of speech and language

services for the habilitation or prevention of communicative impairments, and (5) counseling and guidance of parents, children, and teachers regarding speech and language impairments." 34 C.F.R. § 300.24(14) (2005).

[15] There is no dispute that the 2003-04 IEP, with regard to speech therapy, satisfies the requirements of 34 C.F.R. § 222.50. The only issue is whether or not Jacob can receive some educational benefits from 60 minutes of speech therapy.

The recommendation of 60 minutes per week came from Michelle Munci, Parma's speech language pathologist:

> I can tell you what I thought when I wrote 60 minutes. Jacob being placed in the classroom, he would be receiving speech, and these goals would be carried through throughout his entire day anyway just like it was at the Achievement Center. I felt I needed the 60 minutes to do more specialized training, but that he would still be receiving speech contact because the teachers carry through these things the entire day. They are very language classrooms.

(Tr. at 282.) She based her conclusions on (1) discussions with Jacob's teacher and speech

pathologist at Achievement Center, (2) data from the Achievement Center and Parma, and (3) personal observations. (Tr. at 286-87.)

No evidence in the record suggests that Jacob requires 90 minutes of speech therapy per week to receive educational benefits. Although he was receiving 90 minutes per week at the Achievement Center, that was the standard amount for all children there. (Tr. at 473-74.) As IHO Freda correctly noted, the fact that Jacob was progressing with 90 minutes of speech therapy at the Achievement Center does not mean that 60 minutes would offer him no educational benefits. (IHO decision, at 46.) Obviously, more time would most likely produce more results, but as the Sixth Circuit stated, a school district is only required to "provide the educational equivalent of a serviceable Chevrolet ... [i]t is not required to provide a Cadillac." Doe v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, 459-60 (6th Cir. 1993). Absent any evidence that Jacob actually needs 90 minutes of speech therapy per week [16] to receive educational benefits, IHO Freda did not err in concluding that 60 minutes would still provide Jacob a FAPE.

The Winkelmans also take issue with the lack of one-on-one academic training in Jacob's 2003-04 IEP. This issue goes to the heart of the dispute between the parties. Parma prefers placing Jacob at Pleasant Valley, which focuses on peer interaction. The Winkelmans prefer placing Jacob at Monarch

School, which provides almost no opportunity for peer interaction.

Julie d'Aliberti, Pleasant Valley's kindergarten teacher, testified that "as far as [Jacob's] social and communicative needs, it appears that he would mesh very well with the other students in my classroom due to what I know their needs are and what their levels are." (Tr. at 546.) Michelle Munci, Parma's speech language pathologist, testified that Jacob was successful in small group activities when she observed him at Achievement Center. (Tr. at 269.) She concluded that Jacob would perform well at Pleasant Valley because "he needs to learn how to interact better with peers." (Tr. at 275-76.) All of the witnesses unanimously agreed that learning to interact with peers is one of Jacob's most important needs. (Munci, Tr. at 275-76; Gerber, Tr. at 461; Lumadue, Tr. at 247; Mendell, Tr. at 198; Alspach, Tr. at 159.) As Amy Marie Lumadue, a mental health therapist at Beech Brook Mental Health Center, aptly stated, "life is not a one on one setting." (Tr. at 255.)

Although Jacquelyn Gerber, Jacob's preschool teacher at the Achievement Center, Ms. Lumadue, Debra J. Mandell, director at Monarch School, and Jaime Alspach, a music therapist at Music Therapy Enrichment Center, all testified that Jacob tends to learn better in a one-on-one setting, (Tr. at 436-37, 249-50, 198-99, 151), none of these witnesses testified that Jacob needs a one-on-one setting to receive educational benefits. To the

contrary, Ms. Gerber conceded that Jacob could [17] succeed at Pleasant Valley if the program remained structured. (Tr. at 464-65.) Ms. Mendell conceded that Jacob was doing well in his small group instruction period and that he could learn from a program that included more peer interaction. (Tr. at 199, 214.) Finally, Ms. Alspach stated that Jacob enjoyed being with his peers and that he would certainly benefit from more peer interaction. (Tr. at 151, 159.)

The only witness who was adamant that Jacob needed one-on-one interaction to receive any educational benefits was Dr. Morris Levinsohn, Jacob's pediatric neurologist. He gave his "firm medical recommendation" that one-on-one instruction was critical for Jacob to be successful in a school setting. (Tr. at 314, 342-43.) IHO Freda was not persuaded by his testimony. She reasoned that he is not an educator, he only had limited personal interaction with Jacob, and he had never observed Jacob in a classroom setting. More importantly, most of his information regarding Jacob came from the Winkelmans. For example, he only recommended music therapy because the Winkelmans told him that Jacob likes music. (Tr. at 326.)

In evaluating all of this evidence, IHO Freda made the following conclusions:

> Again, there is no evidence that the child needs a set amount of one-on-one

instructional time to receive a [FAPE]. While it is in fact a truism that any child would receive educational benefit from significant amounts of one-to-one instruction, the IDEA does not require an ideal education or the best education available for a certain child.

. . .

The school district's proposed placement of the child for the 2003-2004 school year involves a special education classroom consisting of six to eight students with a teacher and two aides. One-to-one and small group instruction would be provided throughout the day; in addition, the child would be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments.

. . .

[18] Pleasant Valley Elementary School is not only appropriate as the least restrictive environment, but is clearly preferable to the parents' choice of Monarch School where the child is instructed in a one-on-one environment for the greater part of the day.

(IHO Decision, at 42-45) (emphasis added.)

Given the overwhelming consensus that Jacob needs more peer interaction and that he would receive some educational benefits from Pleasant Valley, the Court concludes that IHO Freda did not err in finding that Pleasant Valley is an appropriate placement for Jacob, despite the reduced amount of one-on-one instruction. Also, contrary to the Winkelmans' assertion, IHO Freda was not required by law to rely Dr. Levinsohn's testimony. Rather, she was well within her right to disregard it based on his lack of expertise in education, his limited personal interaction with Jacob, and the fact that he never observed Jacob in an educational setting. Indeed, a finding of witness credibility is seldom subject to review. See United States v. Gessa, 57 F.3d 493, 496 (6th Cir. 1995).

3. Music Therapy

The Winkelmans argue that the lack of music therapy in Jacob's 2003-04 IEP constitutes a substantive violation of the IDEA and denies Jacob a FAPE. Music therapy is a "related service" and only necessary if the child needs the service to receive educational benefits. Neeley v. Rutherford County Sch., 68 F.3d 965, 969 (6th Cir. 1995). Music therapy was provided for in Jacob's 2001-02 IEP and 2002-03 IEP (Parma's Exs. G and I before IHO). However, no music therapy was provided for Jacob in his 2003-04 IEP. The question is whether or not Jacob needs music therapy to receive educational benefits.

[19] Jaime Alspach, Jacob's music therapist at the Music Therapy Enrichment Center, testified that music therapy was put into Jacob's 2001-02 IEP and 2002-03 IEP because

> [I]t was shown that music was motivating to him, provided structure to him that allowed to work better on his objectives, and from anecdotal data as well as data we saw, he was often performing better on IEP objectives within the music setting than in a nonmusic setting, perhaps the speech or with a teacher.

(Tr. at 156.) However, she conceded that it was not necessary to sing to Jacob for him to understand things. (Tr. at 157.) Mary Beth Koss, the manager of the education department at the Achievement Center, and Ms. Gerber, Jacob's preschool teacher, both agreed that although music therapy certainly aided Jacob, he could still learn outside the music therapy context and pick up skills without the use of music. (Tr. at 398, 450.) Contrary to the Winkelmans' claim, neither Ms. Mendell from Monarch School nor Ms. Lumadue from Beech Brook testified that Jacob needs music therapy to receive educational benefits. The only witness who testified as such was Dr. Levinsohn. The Court has already concluded that IHO Freda was permitted to disregard his testimony because his recommendation was not based on any personal observations but solely on the fact that he was told

that Jacob likes music. (Tr. at 325-26.) Moreover, Dr. Levinsohn is not an expert in education.

It is quite evident that Jacob loves and responds well to music. (McNulty, Tr. at 100; Alspach, Tr. at 147; MacGuire, Tr. at 175; Lumadue, Tr. at 251; Gerber, Tr. at 421, 450, 469.) Fortunately, Jacob's would-be teacher at Pleasant Valley incorporates music into her lesson plans. (Tr. at 529.) Also, Pleasant Valley offers an adaptive music class geared for children with autism. (Tr. at 496.) These services should be very beneficial to Jacob. However, the record does not support the notion that Jacob needs music therapy to receive educational benefits. The only witness to testify to that effect [20] was Dr. Levinsohn, whose testimony was permissibly disregarded by IHO Freda. Thus, the fact that Jacob's 2003-04 IEP did not include music therapy does not constitute reversible error nor deny him a FAPE.

IV. CONCLUSION

For the following reasons, Plaintiffs' Motion for Judgment on the Pleadings Based on the Administrative Record (and request for reimbursement) is **DENIED**; and Defendant's Motion for Judgment on the Pleadings Based on the Administrative Record is **GRANTED**. Each party to bear its own costs.

IT IS SO ORDERED.

Date: June 2, 2005

/s/ John M. Manos
UNITED STATED DISTRICT JUDGE

STATE OF OHIO
DEPARTMENT OF EDUCATION
OFFICE FOR EXCEPTIONAL CHILDREN

IN THE MATTER OF	:	State Level Review Officer
[STUDENT], Student Petitioner/Appellant,	:	Theresa L. Hagen, Esq.

and

PARMA CITY SCHOOL DISTRICT :
Respondent/Appellee,:

DECISION

Counsel for parents of student, timely brought this appeal to challenge the February 25, 2004 IHO decision which determined that the Parma School District has not failed to provide [STUDENT] with a free appropriate public education ("FAPE") and that, under IDEA, the appropriate placement and least restrictive environment ("LRE") for [STUDENT] for the 2003-2004 school year is Pleasant Valley Elementary School as proposed by the IEP team on May 5, 2003. See, IHO Decision at 31, ¶ N.

This due process action began on June 5, 2003 after the parents and school district failed to agree on the Kindergarten placement for

[STUDENT]'s 2003-2004 IEP. Bd. Ex. A, See, also, Bd., Ex. K.

[2] **I. Background**

[STUDENT] first received services from Parma School District at age three for preschool during the 2000-2001 school year pursuant to an MFE on September 1, 2000 which identified [STUDENT] as autistic. Bd. Ex. B. When [STUDENT] did not respond well to the Parma School District preschool program, after attending first, the morning program, then the afternoon program, the parents and school authorities agreed to place [STUDENT] at the Achievement Centers-East starting in July 2001, at the Parma School District's expense. IHO Decision at 7, ¶¶ 19, 22. Thus, the IEPs developed for the 2001- 2002 and 2002-2003 identified the Achievement Center as the LRE placement, specifying under "Reason for Placement in Separate Facility" that the child needed "specialized supports for behavior and academics that aren't available in a public school setting." IHO Decision at 8, ¶ 27; See, Bd. Ex. I, J.

Both the parents and school district were satisfied with [STUDENT]'s educational progress at the Achievement Center and agreed that [STUDENT] was ready to attend Kindergarten in the 2003-2004 school year. Bd. Ex. C (MFE, May 6, 2003: School Age Planning and Reevaluation (school-age MFE) and Parental Consent Form). See,

also, IHO Decision at 8, ¶ 28; School District Brief at 2.

After the school district completed the school-age MFE, the IEP team met on June 2, 2003 and offered [STUDENT] a full-day Kindergarten placement at Pleasant Valley Elementary School with six hours per day of instruction, in the small, special education classroom and opportunities to later transition him into the regular kindergarten classroom as appropriate. Bd. Ex. C; Ex. K (IEP, June 2, 2003); IHO Decision at 10, ¶ 32. In addition, the IEP team recommended sixty minutes of speech therapy as well as [3] occupational therapy, the amount of which would be determined in September 2004 along with the functional behavior assessment (FBA); also, [STUDENT] would participate in adaptive music classes but not music therapy at Pleasant Valley. School District Brief at 4; Bd. Ex. K. At the Achievement Center, [STUDENT] had been receiving sixty minutes of speech therapy and sixty minutes of occupational therapy, plus thirty minutes of both speech and occupational group therapy, and 15 minutes of music therapy. IHO Decision at 8, ¶ 24.

[STUDENT]'s mother participated in the June 2, 2003 IEP meeting along with [STUDENT]'s teacher at the Achievement Center and several school district personnel including the district's speech and occupational therapists, a mental health therapist, the district's Special Education Director and two district special

education teachers. See, IHO Decision at 10, ¶ 33; Parents Brief at 4; Bd. Ex. K. All participants signed the 2003- 2004 IEP including [STUDENT]'s mother although she checked the box indicating that "[she gave] consent to initiate special education and related services specified in this IEP except for LRE." Bd. Ex. K.

In addition, a page and a half document prepared by [STUDENT]'s parents was attached to the IEP outlining their own perceptions about [STUDENT]'s needs and goals, concluding that [STUDENT] "needs to continue in a specialized program." Id., Parent's Attachment to IEP; School District Brief at 4. At the hearing, [STUDENT]'s mother testified that this IEP attachment was prepared as a prior written notice to the school district of the parents' intent to seek a private placement for [STUDENT] at the district's expense. IHO Decision at 10, ¶ 33. Also, she testified that she had told the Director of [4] Special Education as early as February 2003 that she was investigating private placement options for [STUDENT]'s kindergarten and continued school age education. Id. at ¶ 38.

The school district provided the required "Written Notice to Parents" dated June 2, 2003 informing the parents of the district's decision to place [STUDENT] at Pleasant Valley Elementary School. Bd. Ex. P. The form noted that, "parent disagreed with offer of 6-hour classroom in public school setting with self-contained special education

instruction for kindergarten. Parent wants specialized autistic program out of district." Id. Subsequent to the failure to agree on the LRE placement at the IEP team meeting, the parents filed the due process request on June 5, 2003. IHO Exhibit 2.

[STUDENT]'s parents, believing that [STUDENT] would not be able to achieve educational progress at the public school, unilaterally enrolled [STUDENT] in the School starting in September 2003.[1] School District Brief at 5, citing Tr. 216 (Mandell); Parent Ex. 6. The Private School's enrollment includes only children with a diagnosis on the autistic spectrum; the curriculum provides no interaction with other, non-autistic, typically developing peers and all incoming students start with one-on-one instruction. See, IHO Decision at 12, ¶ 44, 45, citing Tr. 200-208 (Mandell).

Prior to the hearing, the parties each submitted a Statement of the Issues to be resolved by due process. IHO Ex. 16, 19, 26. The parents first proposed three questions:

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[1] The parents asserted that the Private School was "an extension of the Achievement Center." Statement of Written Issues by Petitioners, October 14, 2003. No evidence was presented to support any connection between the Achievement Center and the Private School other than both schools were private rather than public schools.

1. Does a school district have the right to change a child's placement after an agreed placement in an alternate setting produced outstanding educational gains?

2. Do the opinions of independent experts, noting the educational gains of the involved child and the necessity of that continues placement, establish the need to continue that same placement?

3. Does the least restrictive environment designation of a public school take precedence over significant educational gains established in an alternate setting, when that setting was agreed to by the public school and recommended by unbiased experts?

Each of these issues will be fully explored in Due Process.

IHO Ex. 19 (October 10, 2003). These issues were reframed in a Memorandum to IHO Freda:

a) The child should continue his education at Private School—an extension of the Achievement Center. The Achievement Center was a placement for the child that

Parma Schools supported and helped fund. Although IDEA contains strong preferential language for mainstreaming, the 7 Circuit Court decided that mainstreaming was not appropriate when the regular classroom provided an unsatisfactory education. Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002)

b) It is well established under IDEA that the school district must provide notice of a change of placement. If the parents wish to contest the change of placement, they may file a due process complaint. The parents in this case believe this is an unauthorized change of placement of which they do not approve. The parents have filed due process as their right.

c) When a more restrictive program has been shown to be successful, the burden of justifying a new IEP, including placement, shifts to the school district. Board of Educ. Of the County of Kanawha v. Michael. M., 95 F. supp. 2d 600 (S.D. W.Va. 2000). The parents believe that the previous IEP, set at the Achievement Center and Private

> School has been very successful. This success, as well as a previous negative history of [STUDENT] at Parma schools, establishes that the current placement at Private is appropriate and in the best interests of [STUDENT].

IHO Ex. 26 (October 14, 2003).

On the other hand, Parma City Schools, believing that the Pleasant Valley Elementary School could provide a FAPE for [STUDENT] and, perhaps more importantly, believing that the public school was the least restrictive environment ("LRE") and most inclusive program for [STUDENT], did not think [STUDENT]'s [6] needs required that he be placed in a private, specialized environment and would not agree to pay for [STUDENT]'s education at the private school. IHO Ex.16 (School District Statement of Issues, Oct 7, 2003). The School District submitted that the sole disputed issue was: "Whether [STUDENT]'s least restrictive environment is a special education resource room at Pleasant Valley Elementary School or the Private School." IHO Ex. 16.

The issue for resolution at the hearing, then, was whether the Parma City School District could provide a FAPE for [STUDENT] at the public school, Pleasant Valley Elementary School.

After four days of hearing (October 16,17, 27, November 6, 2003), IHO Freda issued a Decision agreeing with the Parma City School District that [STUDENT]'s needs did not require a private, segregated placement at the Private School and that [STUDENT] could be provided FAPE in the public school environment at Pleasant Valley Elementary School with sufficient support services to provide [STUDENT] with an educational benefit in the least restrictive environment. IHO Decision at 32 (§ "Decision"), February 20, 2004. In this appeal, the parents challenge IHO Freda's Decision that the Parma School District can provide a FAPE to [STUDENT].

II. SLRO Standard of Review

Upon reviewing the case, the SLRO employs a *de novo* or independent examination of the evidence from the hearing, with deference is given to the IHO for credibility judgments and hearing procedures. See, 34 C.F.R. §300.510(b); *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 621 (6th Cir., 1990). Accordingly, the issues as [7] outlined by the Parents in their Appellate Brief ("Parents' Brief) are reviewed as whether, in reaching her decision, IHO Freda's conclusions were well supported in law and fact, *de novo*; and, whether, IHO Freda acted without bias or abuse of discretion in determining witness credibility or resolving evidentiary conflicts and that such discretionary decisions were not clearly erroneous.

Further, on appeal before the state level review officer ("SLRO"), there is no presumption of error in the IHO decision and, as such, the "appealing party bears the burden of raising claims of error and *demonstrating* that such errors were committed." *In Re Student with a Disability*, 30 IDELR 408, 410 (1998) (emphasis added); see, also, *Lyons by Alexander v. Smith*, 829 F. Supp. 414, 417 (D.D.C. 1993) (burden is on the party challenging an IHO determination to persuade the reviewing court that the IHO was incorrect); *accord*, *Dong*, 31 IDELR at 157; *Cordray*, 917 F.2d at 1469.

As argued by the school district, it is agreed that the Parent's arguments as presented in their Brief are unsupported and unsubstantiated, without references to evidence or legal authority, and contrary to their burden on appeal.[2] School

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[2] In telephone conferences to each party's counsel on March 20, 2004, counsel for both the Parents and the school district sought the opportunity to submit legal briefs on the issues on appeal. A scheduling Order was prepared with the Parent Appellant's brief due on April 15, 2004 and the School District's Appellee brief due on May 7, 2004. Extension of Time and Scheduling Order, March 20, 2004. Unfortunately, while the Parents identified certain issues in their Appellate Brief, they offered little to no legal support (except two inapplicable cases contrary to the law of this jurisdiction) or evidentiary references for their arguments as proof to consider in making this decision as required by law. Id. at fn 1, (reminding

District Brief at 1. Nonetheless, each issue raised in the parents' brief will be treated as an assignment [8]of error and given appropriate consideration within the applicable standard and scope of this review of IHO Freda's Final Decision. Thus, the issues as raised by the parents' brief are that procedurally, IHO Freda acted improperly when she employed an assistant who attended the due process hearings and when she allowed for excessive time delays that cause harm to the parents, and that substantively, IHO Freda erred when she assigned the burden of proof to the parents, found that the LRE was the key issue to be resolved at the hearing, decided that a smaller class size was not a "critical element" for [STUDENT]'s education, minimized the importance

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parties that citations to the record and law are required); See, also, School District Brief at 1. While the Appellant Brief, then, is more a recitation of complaints and a general disagreement with the public placement by the parents, under the spirit of IDEA, the parents should be allowed the benefit of the process of appealing the IHO Decision, even though they are represented by counsel. Thus, while this appeal could be summarily dismissed as failing to meet the burden of proving and persuading that certain errors were committed and contrary to law, nonetheless, the asserted errors are each being considered as an assignment of error in the order presented in the Parents' Appellate brief and the proceedings reviewed *de novo* where appropriate.

of the TEACCH methodology, and when she disregarded the parents' expert witness's testimony. Each of these issues will be considered as the parents' assignments of error for which the parents bear the burden of proof and persuasion.

III. Procedural Errors

In this Appeal, the parents assert two improper procedural decisions and actions by IHO Freda. First, the parents complain that because the "IHO [is] the sole person entitled to hear and decide this due process case," IHO Freda improperly employed an assistant whose "presence infected the process." See, Appeal Brief at 2. Secondly, the parents complain that, "the time delay for the decision was unconscionable." Id. The parents, as the complaining party, bear the burden of proving and persuading that IHO Freda's procedural decisions were clearly erroneous and contrary to law.

Further, because the IHO had the discretion to make the procedural determinations complained of by the parents, then the review standard is whether IHO Freda abused her discretion or committed clear error when making these judgments. [9] Thus, the procedural issues to reviewed in this appeal are whether IHO Freda acted without bias, abuse of discretion, or clear error when she employed an assistant and when she granted extensions of time.

A. IHO Freda's Assistant

Parents complain that, because under IDEA and Ohio law an IHO is the "sole person to hear and decide" due process disputes, then an IHO may not employ any additional individuals to assist the IHO in the due process hearing. See, Parents' Appeal Brief at 2. The parents do not complain that the IHO could have employed assistance *outside* the hearing; rather the complaint is limited to the fact that an assistant attended the "actual hearing [and] took notes, performed research and generally participated in the hearing." Id.

While parents' counsel argues that the assistant's "unauthorized participation was a violation of established procedure," the brief is completely void of any references to law that would support the notion that an IHO is prohibited from including an assistant or law clerk or any other employee to aid in the hearing process. Id. To the contrary, as pointed out by the school district, the use of a law clerk or research assistance is common practice in both the state and federal courtrooms. School District Brief at 7, fn 25.

Furthermore, the argument that "the 'assistant' was never agreed to by the Petitioners (nor the Respondents) and her involvement was never sanctioned by either party" is contrary to the record. Parents' Brief at 2; See, School District's Brief at 6; Peer Aff. at ¶ 5; IHO Ex. 20 (Disclosure Conference Memorandum, October 10, 2003: "Also

present was Ann Oakar, attorney, as an invitee of the hearing officer, after consent of [10] both parties."). In fact, the parents did not object to the presence of the assistant when IHO Freda asked if there were any procedural objections at the start of the hearing. See, School District's Brief at 6, citing Tr. 14 (IHO Freda). Thus, there was nothing inappropriate or prohibited by including an assistant to the IHO in the hearings.

In addition, if and when procedural violations are found to have occurred in a due process action, the violation must be shown to have adversely affected the student's educational progress. See, *Bd. Of Educ. Of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 76, 207 (1982). In their brief, the parents simply state that the "presence [of the assistant] infected the process." Parents' Brief at 2. While "infected" certainly implies something negative, there is nothing further in the brief as to how, when, or why the assistant's presence was "infecting" the process. Without any evidence from the parents as to the negative effect that the assistant had on [STUDENT]'s educational progress, the argument completely fails as a matter of law.

Thus, the assignment of error suggesting that IHO Freda violated IDEA procedures in allowing an assistant to attend the hearings is not well taken. Accordingly, it is found that IHO Freda did not violate the IDEA and Ohio due process procedures by employing an assistant.

B. Time Delay

The parents also complain, procedurally, that the "time delay for the decision was unconscionable." Parents' Brief at 2. In support of their argument, parents point out that the "decision took an unbelievable 107 days" and the entire "case took 262 days to decide or more than five and a half times the length of the guidelines." Id. at 2-3. [11]

Albeit unfortunate that the due process action took nearly nine months (June 5, 2003-February 20, 2004) to complete and resolve, there is nothing in the record of the case to suggest any unnecessary or improper delays. IHO Ex. 1 (Parent's letter requesting due process, June 5, 2003); IHO Decision (February 20, 2004). All time extensions were appropriate given the parties' issues and schedules; indeed, the first time extension, filed on June 24, 2003. was a 45-day request from *the parents* in order to obtain counsel. IHO Ex. 5, June 7, 2003. IHO Freda granted the request, but extended the final decision due date only thirty days, from July 20, 2003 to August 20, 2003 which actually would have resulted in a final decision before the new school year started. IHO Ex. 6, Extension of Time Order, July 2, 2004.

The second extension of time was a *joint request*, agreed to by both the parties, in order to accommodate the pre-hearing and hearing schedules. IHO Ex. 10, Second Extension of Time, August 20, 2004; IHO Ex. 8, Scheduling Order

(August 12, 2003). Thus, the first five months (approximately 150 of the 262-day timeline calculated by the parents) were spent in pre-hearing activities at the request of the parties, including time to obtain counsel for parents, for parties to brief and resolve a stay-put placement dispute, and for all due process hearing scheduling, preparations, and completion. See, e.g., IHO Ex. 8, Scheduling Order, August 12, 2004; IHO Ex. 11, Parma School District Brief in support of Stay Put at Pleasant Valley Elementary School; IHO Ex. 12, Parents' Brief Re: Stay Put (August 28, 2004). After the final day of the hearing on November 5, 2003, another month was allowed for the parties to submit post-hearing motions and briefs. See, e.g., IHO Ex. 29, 30 (Motion to Strike and Reply); Post-Hearing Briefs. The time delays in the first six months, then, were neither caused by or for the benefit of the IHO, [12] but rather to appropriately accommodate the parties' interests and schedules without bias or abuse of discretion.

Finally, the last three extensions of time (January 5th, January 12th, and February 19th) were required to allow the time necessary for the IHO to thoroughly and thoughtfully consider the record, including the entire transcript and documents, conduct research, and review all other evidence offered by both parties in order to complete the final decision. IHO Ex. 31, Extensions of Time. Considering the volumes of materials in the case record along with the number of witnesses and length of the transcript, the time extensions do

not demonstrate an abuse of discretion on the part of IHO Freda. In addition, as pointed out by the school district, parents did not object to these extensions of time. School District Brief at 8. Thus, the appellants' complaint about excessive time delays is not well-taken and not found to be supported in the record.

Ultimately, while procedural errors can be found to be either significant or *de minimus*, they must be presented and proved by the injured party *as it relates to the child's education. Rowley*, 458 U.S. at 207 (emphasis added) ("reasonably calculated to enable the child to receive educational benefits").

The parents have not complained of any consequences to [STUDENT]'s education; to the contrary, they argue that the harm caused by the procedural delay "caused positive harm to the parents." Parents' Brief at 5. Of course, as the school district notes, the positive harm to the parents was financial, a risk they assumed with the unilateral enrollment of [STUDENT] in the Private School. School District Brief at 8, fn 27 ("[h]ad Petitioners complied with the stay-put order, [STUDENT] would have [13] attended the Achievement Center, at the District's expense, during the pendency of the due process hearing.").[3]

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[3] Parents did not assert any error regarding the IHO stay-put decision; thus any stay-put issues are outside of the scope of this appeal. Nonetheless, it is noted that had the parents complied with the

Accordingly, upon review of the documents and records of the proceedings, including IHO Freda's Decision and Exhibits, it is concluded that IHO Freda did not abuse her discretion nor act in clear error in either employing an assistant or granting the extensions of time requests and that the due process procedures were in compliance with IDEA.

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stay-put order, [STUDENT] was to have attended the Achievement Center. IHO Ex. 13, Interim Order-Stay Put (August 28, 2003). Although a stay-put issue was not raised or briefed, and thus, not adequately reviewed on appeal, it seems that even though the Achievement Center was the "then-current placement" for [STUDENT] when the due process complaint was filed in June 2003, because the Achievement Center does not serve year-olds, and [STUDENT] had completed the preschool curriculum, been reevaluated under IDEA for a school age MFE, and was ready for kindergarten, then the Achievement Center might not have been an appropriate stay-put placement for [STUDENT] for the Fall, 2003. Thus, contrary to the school district's argument, it is questionable whether parents could have complied with the stay-put order. Nonetheless, the parents still bear the burden of proving that the school district cannot provide FAPE at the proposed placement at Pleasant Valley.

IV. Substantive Errors

Upon reviewing the substantive issues of the case, the SLRO must give deference to the IHO for credibility judgments and evidentiary resolutions but employ a *de novo* review of the IHO's statutory interpretation and legal rulings. 34 C.F.R. §300.510(b); *Thomas*, 918 F.2d at 621. Thus, a determination of whether an eligible child has been provided FAPE pursuant to an appropriate IEP, including the LRE placement and related services, is a mixed question of law and fact, reviewed *de novo* on appeal. *Thomas*, 918 F.2d at 621. On the other hand, when the IHO has the discretion to make certain determinations complained of by the parents, including witness credibility and judging the sufficiency and weight of the evidence, the review standard is to give deference to the [14] IHO unless it can be demonstrated, by the party raising the issue on appeal, that such judgments were clearly erroneous. *Id.*

The parents asserted five assignments of error as substantive violations of IDEA, arguing that the IHO erred when she: A. assigned the burden of proof to the parents; B. found that the least restrictive environment ("LRE") placement was the key issue to be determined through due process; C. decided that a smaller class size was not a critical element; D. minimized the importance of the TEACCH methodology; and, E. disregarded parents' expert witness, Dr. Levinsohn's, testimony.

A. Burden of Proof

Parents complain that the "IHO erred when she incorrectly ignored the burden of proof responsibility on the part of the school for a change in an IEP." See, Parents' Brief at 3, ¶ 1. Because the question of whether the IHO applied the correct legal standard of proof is a question of law, the error asserting an incorrect assignment of the burden of proof is reviewed *de novo* on appeal. *Thomas*, 914 F.2d at 621.

In support of the argument that the burden of proof should have been assigned to the school district, parents cite to two cases outside of this jurisdiction: *Board of Education of the County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D.,W.Va., 2000) and *Lascani v. Board of Education*, 560 A.2d 1180 (N.J. 1989). In *Michael M.*, the court found that when a child is currently enrolled in a more restrictive program, the school district must prove that the child's placement can change to a less restrictive program. *Michael M.*, 95 F. Supp. at 608. Likewise, *Lascani* found that once a child has shown a "history of achievement" in a particular placement, then the school district must [15] prove that a change in placement would be appropriate for the child. *Lascani*, 560 A.2d at 1194.

Michael M. and *Lascani*, however, can offer no help for the parents' argument that the school must bear the burden of proof in this case. While

both the West Virginia district court and the New Jersey state court have followed the jurisdictions that find that the burden of proof should be shouldered by the school district to prove that FAPE has been provided to a student, Ohio must follow the 6th Circuit's settled decisions that the burden of proof rests with the party challenging the IEP. See, *Dong*, 31 IDELR at 57; *Cordray*, 917 F.2d at 1469.

As pointed out by the school district in their brief, there is a distinct split among the federal circuits as to which party bears the burden of proof in IDEA due process actions. School District Brief at 9, fn 30. ("The Second, Third, Eighth, and Ninth Circuits place the burden of proof on the school district in all instances. The Fifth, Sixth, and Tenth Circuits place the burden of proof on the party challenging the IEP.") Indeed, this split of authority is noted in the *Michael M.* case, one of the two cases relied upon by the parents. See, *Michael M.*, 95 F. Supp. 2d at 608.

As the school district explained in their brief, regardless of the particular issue in dispute, the district court in *Michael M.* adopted the reasoning from the New Jersey state court, that the school district should *always* bear the burden of proof because the school district has the legal obligation under IDEA to provide a FAPE and because the school district is in a better position to meet the burden of proof. School District Brief at 8, fn 29, citing *Lascari*, 116 N.J. at 44-45; *Michael M.*, 95 F.

Supp. at 608; (New Jersey is in the federal jurisdiction of the Third District, which assigns the burden of proof to the [16] school district). Indeed, the 6th Circuit has expressly rejected opportunities to adopt similar arguments and shift the burden of proof to the school district, unless the school district is the party challenging the IEP. *Dong*, 31 IDELR at 157.

The parents simply cannot rely upon West Virginia and New Jersey burden of proof case law that is directly contrary to our own jurisdiction's well-settled burden of proof standard that the IEP challenger must bear the burden of proving that the placement is not appropriate under IDEA.

In fact, notwithstanding the fact that in the 6th Circuit the burden of proof clearly rests with the parents who are challenging the IEP, even assuming *arguendo* that the school district *did* have the burden of proof, the lengthy record favoring the proposed kindergarten placement for [STUDENT] certainly and sufficiently would carry the burden to prove that the school district could provide FAPE for [STUDENT] at the Pleasant Valley Elementary School. IHO Decision at 30, ¶¶ E, F; at 32 (§ "Decision").

Thus, the parents' assignment of error alleging improperly placing the burden of proof on the parents is not well-taken and contrary to the settled law of the 6th Circuit. The IHO properly relied upon *Dong* as the law of this jurisdiction and,

accordingly, the decision that the burden of proof rests with the parents who challenged the IEP is affirmed.[4]

B. Least Restrict Environment ("LRE")

[17] The parents next complained that the "IHO erred when she stated that the LRE was the key issue in the due process and not the question of appropriate services offered in the IEP." Parents' Appeal Brief at 4, ¶ 2. On appeal, the issue as to *whether* the IHO properly considered evidence is an issue of law under IDEA that is reviewed *de novo*, while the issues regarding the sufficiency and weight of the evidence are given deference to the IHO. *Thomas*, 914 F.2d at 621.

Thus, IHO Freda's decision is reviewed *de novo*, with an independent review of the record, to determine whether she considered all the appropriate evidence, including evidence regarding

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[4] In addition, the IHO decision that the parents did not carry their burden of proof that [STUDENT] could not be provided FAPE at the public kindergarten proposed by the school district is affirmed. See, IHO Decision at 30, ¶ E; 32. The parents' argument, however, thus the assignment of error and scope of this review, rested solely on the point that the IHO reversibly erred in relying upon *Dong* and not applying *Michael M.* and *Luscani* to determine the burden of proof. Parents' Brief at 4.

both the LRE and the related services needed by [STUDENT] to succeed educationally, when she concluded that the Parma City Schools could provide a FAPE to [STUDENT]. If, in fact, IHO Freda properly considered all of the evidence, then her evidentiary conclusions regarding whether the school district could provide FAPE are given deference on review and reversed only if clearly erroneous.

The parents' argument focuses on asserting that IHO Freda improperly considered LRE as the key issue to be decided in this case. Indeed, throughout the entire dispute, from the IEP meeting before due process was filed, during the stay put argument, in pretrial issue statements, and post trial briefs, and including the entire relief requested in this appeal, the parents repeatedly emphasized in their arguments simply that [STUDENT] should be placed at the Private School at the school district's expense. See, IHO Ex. 1 (Parents' Letter requesting due process: "only possible resolution is to place [STUDENT] in a specialized autism program"); Ex. 4 (ODOE Form: Parents' Request for Due Process); Ex. 12 (Parents' Brief Re: Stay Put Provision); IHO Ex. 19, 26 (Parents' Statements of Issues); IHO Ex. 30 (Parents' Response to Motion to Strike); see [18] also, School District Brief at 9 citing IHO Decision at pp.2, 32, 54 (that the Parents unilaterally enrolled the child in the Private School and now seek reimbursement from the district "further suggest that the essential dispute in this matter is

the LRE placement."); Bd. Ex. K (parent signed "I consent to all services *except* LRE"); Parents' Brief at 9 (relief requested).

With the multiple documents and pages of testimony focused on parents' request for [STUDENT]'s placement at the Private School, particularly considering that the parents' *sole* complaint at the IEP meeting was the LRE, the parents simply cannot now be heard to complain that IHO Freda incorrectly considered the choice of placement (LRE) as the central issue of this dispute. Nevertheless, the issue remains as to whether IHO Freda adequately and appropriately considered all the evidence in determining that the school district's proposed IEP, including both the LRE and the related services, could provide FAPE to [STUDENT].

To further complicate this issue, however, parents completely misrepresent the nature of the school district's decision to offer [STUDENT] FAPE at the public elementary school as a *change* in placement. Parents' Brief at 5; IHO Ex. 26 (Memorandum Re: Parents' Issues); See, also, IHO Ex. 19 (b) (Parents' Statement of Issues: "It is well established under IDEA that school district must provide notice of a change in placement. If parents wish to contest change in placement, they may file a due process complaint. Parents in this case believe this is an unauthorized change of placement to which they do not approve."); Ex. 19 (a) ("Parents state that the child should continue his

education at Private School—an extension of the Achievement Center.")

[19][STUDENT] had completed the preschool curriculum at the Achievement Center; necessarily, and as agreed by the parties, it was time for [STUDENT] to leave the Achievement Center and move ahead to the next educational level, kindergarten. See, also, Aff. of J. Hudgins; School District Stay-Put Brief ("because [STUDENT] has turned year old and he is a school-age child, he cannot attend the Achievement Center preschool."). Therefore, the disagreement at the June 2, 2003 IEP meeting was not about *whether* [STUDENT]'s educational placement would "change" from the Achievement Center; rather, the disagreement was whether that change would be to place [STUDENT] at the public school (Pleasant Valley) or at a new private school (Private School). See, e.g., Ex. K (proposed 2003-2004 IEP); IHO Ex. 1 (due process request).

As pointed out by IHO Freda and as found in a *de novo* review of the record, absolutely nothing in the records, either documents or testimony, support the notion that the Private School is simply a continuation of the Achievement Center program. See, IHO Decision at 28, ¶ 137. Even if it was, there is still a significant change in [STUDENT]'s education between preschool and kindergarten; indeed, a school age MFE must be conducted to update the preschool MFE—that is, each child must be reevaluated once the child is

school-age. See, Ohio Model Policies and Procedures for the Education of Children with Disabilities (2000) at § 6, IEP/LRE, at 56-57, "transition process" from preschool to school age); IHO Decision at 36. Certainly, parents don't suggest that [STUDENT] should continue to be served under the preschool MFE; likewise, parents aren't suggesting that [STUDENT] should stay in preschool. Thus, all parties agree that [STUDENT] is ready to *change placements* from preschool to a school-age environment, [20] starting with kindergarten. See, IHO Ex. 19, 26 (Parents' Statement of Issues); IHO Ex. 16 (School District Statement of Issues).

So, because [STUDENT]'s school placement must necessarily change after preschool, parents' argument that the school district was trying to improperly change [STUDENT] is completely without merit. Again, as determined by IHO Freda, and agreed to by the parties *at the time of the hearing*, the central dispute arising from the June 3, 2003 IEP meeting was, in fact, *where* [STUDENT] would continue his education after preschool.

The overall flaw in parents' logic seems to rest in the fact that because Parma City Schools could not serve [STUDENT] in the public preschool when [STUDENT] was three, then Parma City School will not be able to serve [STUDENT] in the public kindergarten and elementary school now that he's six. Of course, there is nothing in the record to support such a speculative conclusion; to

the contrary, there is voluminous evidence to support the school district's position that they can and should serve [STUDENT]'s needs as a school age student and that [STUDENT] would be successful in a public, kindergarten environment with related services support. See, *e.g.*, testimony of J. Alspach (Tr 153-54); K. Foley (Tr. 356-59), J. Gerber (Tr. 463-64); J. Hudgins (Tr. 667-68); M. Munici (Tr. 271-73); Y. Newlin (Tr. 605); S. Rueger (Tr. 363), K. Tomko (Tr. 485): in a *de novo* review of the record, the witnesses agreed that [STUDENT] was academically ready for the kindergarten curriculum and socially ready for a more inclusive environment, specifically the special education kindergarten program at Pleasant Valley Elementary School; IHO Decision at 12, ¶ 47 citing Tr. 199 (Mandell, Director, Private School, who acknowledged that [STUDENT] could have some [21] educational success in settings other than one-to-one, specifically in a classroom with five-seven children; "he would learn but would learn less.")

Actually, completely contrary to the parents' assertion that the IHO considered the LRE in exclusion of considering the specialized services needed by [STUDENT], IHO Freda painstakingly dissected each service element of each of [STUDENT]'s past, current, and proposed programs: at the Achievement Center preschool, in Ms. D'Aliberti's kindergarten classroom at Pleasant Valley, and the Private School program. See, IHO Decision at ¶¶ 27-28, 65-66, 99, 133-136 (Re: Achievement Center); ¶¶ 105- 109, 112, 123-127

(Re: Pleasant Valley); ¶¶ 40-47, 11-116, 138-142 (Re: Private School); School District Brief at 10, citing IHO Decision at 30-33, 36-51 (pointing out the thoroughness with which IHO Freda examined each service offer to [STUDENT]).

In fact, after reviewing the specifics of all three programs, *de novo*, they all compared similarly in structure, focus, and educational philosophy, with the Private School the most restrictive environment employing almost all one-to-one instruction and very little group or peer interactions, the Pleasant Valley classroom the most inclusive environment, employing both one-to-one and small group instruction along with the most opportunities for peer and other student social interactions, and the Achievement Center's program falling somewhere in between with one-to-one and small group instruction, and daily peer interactions. See, IHO Decision at 12, ¶¶ 43-44, citing Mandell (Tr. 200-226); at 16, ¶¶ 66, citing Gerber (Tr. 415-419); at 21-22, ¶¶ 107-108, citing D'Aliberti (Tr. 520- 23, 532-34); (e.g., at the Achievement Center, [STUDENT] had experienced some opportunities to interact with both higher functioning and normally developing peers, [22] whereas the Private School provided absolutely no such interactions and, in fact, limited lunchtime to include only one other student).

Arguably, then, the arrangement at Private could even be characterized as regressive to [STUDENT]'s needs for improved and increased

social interactions.[5] See, e.g. testimony of J. Newlin (Tr 605) who did not consider the Private School an appropriate fit for [STUDENT]'s educational needs; IHO Decision at 24, ¶ 116. See, also, IHO Decision at 40, citing 34 CFR § 300.551 (b)(1) ("the parent wishes to maintain the child's placement on the continuum of alternative placements [citation omitted] at a special *school*, which is one step further along the continuum, i.e., more restrictive that the IEP team's recommendation of special *class*.") (emphasis added); 20 U.S.C. § 1412 (1)(5)(A); 34 C.F.R. § 300.551. As IHO Freda points out, contrary to the obligations under IDEA to provide services in an inclusionary environment to the maximum extent possible, "the child, who now attends Private School, is effectively being educated in a one-to-one environment that incorporates minimal contact with other children with disabilities and no contact with nondisabled students." IHO Decision at 40; 34 C.F.R. § 300.347.

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[5] Furthermore, [STUDENT]'s lead teacher at the Achievement Center testified that [STUDENT] tended to "pick on" lower functioning students and was more successful with behavior and academic goals when he interacted with peers and higher functioning students. See, IHO Decision at 20 ¶ 99, J. Gerber (Tr. 479). Yet, currently, at the Private school, [STUDENT] is one of the highest functioning students; only two or three students out of 23 students are higher functioning than [STUDENT]. IHO Decision at 11-12, ¶¶ 41, 45 citing Mandell (Tr. 75, 203, 228-29).

At the very least, however, before [STUDENT] attends a *more* restrictive environment, under IDEA, it *must* be found that [STUDENT] could not achieve any educational success in the more inclusive, public environment favored by IDEA. 34 C.F.R.§ 300.347. (school district must provide special education in an inclusionary [23] environment with disabled and nondisabled students to the maximum extent possible). Indeed, IDEA and the case law both *disfavor* non-public school placements and support private placements only when it has been clearly demonstrated that no educational progress can be made in the public school environment. See, e.g., *Rowley, 458 U.S. at 208*; *Dong*, 31 IDELR at 157.

It is concluded then, after a *de novo* review of the record, that IHO Freda's decision is thorough and well-reasoned, and that all evidence, both testimonial and documentary, was appropriately examined in her lengthy and well-supported decision. Contrary to parents' assertion that IHO Freda considered only the LRE and not the services need by [STUDENT], in her decision, IHO Freda thoughtfully addressed each of the related services needed by [STUDENT] to continue to progress educationally, as well as whether the school district could adequately and appropriately provide each of those services to [STUDENT] at the public placement at Pleasant Valley. Further, upon *de novo* review, IHO Freda's determination that, under IDEA, the Pleasant Valley Elementary School is the appropriate placement, as the LRE

with the most inclusive opportunities *and* related services, for [STUDENT] is affirmed as well supported in law and fact. Accordingly, the assignment of error that IHO incorrectly considered the LRE as the key issue and not the related services is found to be completely without merit.

C. Smaller Classrooms

Next, the parents argued that the "IHO erred when she asserted that smaller class size was not a critical element for [STUDENT] W[]'s education." Parents' Appeal Brief at 4-5, ¶3. Parents argued that the "IHO mistakenly took the view that one on one instruction [24] was 'the best education possible' and that school district need not offer the 'best to children' in order to supply an appropriate education under the standards set by [Rowley]." See, Parents Appeal Brief at 5. The parents argue that [STUDENT] has an "absolute need for one on one instruction," yet agree throughout their brief that [STUDENT] experienced educational success at the Achievement Center which offered only some one on one instruction and has been successfully transitioning [STUDENT] to small groups and more social interactions. See, Parents' Brief at 5 ("uncontested that [STUDENT] had made excellent progress at the Achievement Center); IHO Decision at 8, ¶ 26 (Bd. Ex. N), at 16, ¶ 69 citing Gerber (Tr.438-39).

Curiously, then, parents go on to point out that the Private School would provide almost exclusively one-to-one instruction even though [STUDENT] had been receiving both one-to-one and small group education at the Achievement Center. Parents' Brief at 5 ("[STUDENT]'s work at the Achievement Center had been *largely* one on one and Private, the proposed school was almost exclusively one on one") (emphasis added). The only support offered as persuasion that [STUDENT] now needs *exclusively* one-to-one instruction was a statement that "Amy Lumadue who had worked with [STUDENT] for years stated that one on one instruction was key and that [STUDENT] lost focus when additional individuals were involved."[6] See, Parents' Appeal at 5.

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[6] Actually, parents assert that "the absolute need for one on one instruction was documented *by the teachers who knew STUDENT best.*" Parents' Brief at 5 (emphasis added). Completely contrary to the parents assertion, the "teachers who knew [STUDENT] best" in fact agreed that [STUDENT] could succeed educationally in less than a one on one environment, a point already discussed in § B, *supra*, at 20-21. Indeed, the one teacher "who knew [STUDENT] best," his lead teacher at the Achievement Center, Ms. Gerber, thought that [STUDENT] could be served in a special education class at Pleasant Valley and "believe child would benefit from a school environment with more typical peers." IHO Decision at 17, ¶¶ 173, 174, citing Gerber (Tr 462-63). In the interest of time

[25]Because no citation to the record was provided, it was difficult to find Ms. Lumadue's statement that the parent relied upon; however, in reviewing her testimony, it was found that Ms. Lumadue did state that [STUDENT] was sometimes distracted "when more people were in the room," but it could not be found that Ms. Lumadue thought that "one on one instruction was key." See, testimony of Lumadue (Tr. 255); IHO Decision at 14, ¶ 57, Tr. 247-250 (Lumadue). In fact, Ms. Lumadue now instructs [STUDENT] in a small group of four children. IHO Decision at 14, ¶ 55, Tr. 251 (Lumadue).

In fact, it is clear that Ms. Lumadue was in favor of increasing [STUDENT]'s social interactions with his own peers as well as higher functioning and normally developing peers, an opportunity that would not be available at the Private School. See, testimony of Lumadue (Tr 247-255); See, also, School District's Brief at 2; IHO Decision at 14, ¶ 57, citing Lumadue (Tr. 247-250, 255) (opining that [STUDENT] needs to develop his social skills in larger group settings because life skills typically occur in an environment "with a lot of people around you.").

Thus, the suggestion that [STUDENT] has an "*absolute* need for one-to-one instruction" is not supported in the record; indeed, the record supports the opposite conclusion that [STUDENT] has a

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and space, however, the argument will not be further revisited here.

need for more social activities including more small group instruction as well as peer and non-peer interactions. See, e.g. testimony of Lunadue (Tr. 255), Gerber (Tr. 463-64). Therefore, IHO Freda did not "mistakenly take the view that one on one instruction was the best education possible. . . [instead of finding that] [STUDENT] had an absolute need for one on one instruction." Rather, IHO Freda simply found no evidence to support parents' assertion that [STUDENT] required one-to-one instruction. See, IHO Decision at 29, ¶ E. Indeed, IHO Freda found [26] overwhelming evidence to the contrary, and concluded that [STUDENT] would benefit educationally from the more inclusive and less restrictive environment at Pleasant Valley. See, IHO Decision at 31, ¶ L; at 42-45.

In addition, then, parents go on to argue that the IHO made a flawed conclusion "that there was no evidence that [STUDENT] could not learn effectively with less one on one" because *first*, she could not "calculate the gains made by a child in a certain set of conditions and then potentially change the conditions and project similar gain, and *second*, "she again misunderstands the burden of proof for this change in placement."

First, it is a completely disingenuous and contradictory argument to suggest that IHO Freda improperly considered that the academic progress at the Achievement Center would help predict or "project" similar academic progress at another or

"changed" environment. Indeed, this is the very same argument that is at the heart of the Parents' Appeal: considering [STUDENT]'s progress at the Achievement Center, it must be concluded (i.e. "projected") that [STUDENT] would educationally progress at the Private School. See, IHO Ex. 26 (Parents' Statement of the Issues: (a). . .the child should continue his education at Private School—an extension of the Achievement Center); Parents' Appeal at 6, § 4 ([STUDENT] was educationally successful at the Achievement Center where they used the TEACCH methodology and the Private School offers the same methodology); Parents' Appeal at 5, § 2 ("[STUDENT]'s work at the Achievement Center had been largely one on one and Private, the [parents'] proposed new school, was [sic] almost exclusively one on one.") That is, because of [STUDENT]'s progress at the [27] Achievement Center, the parents argue that [STUDENT] must be placed at the Private School.[7]

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[7] To follow this logic, it must be assumed that the Private School is the same "set of certain conditions" as the Achievement Center whereas Pleasant Valley is a different "set of conditions." This assumption fails, however, because the entire record supports the conclusion that the Private School is also different from the Achievement Center, i.e. the Private School uses exclusively one-to-one instruction while the Achievement Center employed both group and one-to-one instruction as well as opportunities for higher functioning and normally developing peer interactions.

Parents, then, cannot say that the IHO's argument was flawed just because in considering the same progress at the Achievement Center, she concluded that [STUDENT] should be placed at the public school. Same educational gains "calculated," and same educational gains "projected" just different conclusions as to the "condition changes." Therefore, parents' first argument in support of asserting that IHO Freda erred because she projected similar gains in a changed environment in concluding "that there was no evidence that [STUDENT] could not learn effectively with less one on one" completely fails.

In addition, parents second argument to support their contention that IHO Freda erred in concluding that [STUDENT] could succeed educationally with less one on one instruction suggests that the IHO "again misunderstands the burden of proof for this change of placement." Parents' Appeal Brief at 5. Without any legal authority whatsoever, parents argue that "[I]t is not appropriate nor fair that parents be asked to prove that education cannot take place with more children present. It is the district's burden to show that similar educational gains are possible with changed circumstances." Id. Not only is this statement contrary to law, but, unbelievably, parents continue that "[t]his is especially true when these changed circumstances are *forced* upon a student [28]who has demonstrated great educational gains in the previous environment." Id. (emphasis added).

Although this argument, and logic, is certainly difficult to follow, presumably the parents truly believe that the Private School is *not* a change in circumstances while Pleasant Valley Elementary is a change in circumstances. Likewise, similar to the burden of proof argument, the faulty assumption here is that the changed circumstances are "forced" upon [STUDENT].

Because [STUDENT] has completed preschool and is ready for a school age environment [STUDENT]'s circumstances must necessarily change and *both* the Pleasant Valley Elementary School and the Private school are changes in circumstances for [STUDENT]. The difference in the two programs is that the public program is a little less restrictive (e.g., six to eight students with a teacher and two aides) and a little more inclusive (e.g., school assemblies, recess, and lunch with non-disabled peers) than the Achievement Center that [STUDENT] has been used to attending and the private program is a little more restrictive (e.g., "almost exclusively one on one instruction") and a little less inclusive (e.g. lunch with only one other student) than the Achievement Center. See, IHO Decision at 42-45.

Finally, parents suggest that the "level of service to the child was already established by the institution performing the service." See, Id. at 6. Certainly, under IDEA, that a "particular institution," rather than an IEP team, would "establish" a "level of service" is a completely novel

interpretation of the rules and regulations. See, 20 U.S.C.A. § 1412; 34 C.F.R. § 300.552 (b) (annual determination of placement and related services by IEP team); 34 C.F.R. § 300.347 (FAPE). Presumably, then, once a child was [29] placed at a "particular institution" there would not be a need for an IEP team; nor would the related services necessarily need to be reevaluated each year since the "particular institution" would "establish" the services.

Of course, the notion that an institution "establishes" its own services required for a child to receive FAPE under IDEA is completely contrary to law. On the other hand, if the parent was not seeking reimbursement or funding from the public school district, then a private institution and the parent, could, in fact, establish what services a child would receive at that particular institution. When the parent, however, looks to the school district for the payment of their child's education and services necessary to receive an education, then the school district has both the responsibilities and the choices to assure that the child has the appropriate educational opportunities.

Nowhere in law is it supported that the parent selects a program and the school district pays for it. Nor can a parent even expect or demand that a particular program continue from year to year. To the contrary, *because* the school district is financially responsible for the education of the children in their district, then the school district is

responsible, with deference given, to choose the methods, manners, and placements of the education and services; parents cannot dictate a particular program or method. See, *Renner v. Board of Education of the Public Schools or the City of Ann Arbor*, 185 F.3d 635, 645 (6th Cir. 1999) (citing to *Rowley, 458 U.S. at 208).*

In addition, while the parents may prefer a particular methodology or program for their child, the school need only *consider* the parent's request and not, necessarily, include or use the parent-preferred program, even if the parent-suggested methodology [30] has been shown to be superior to the methods chosen by the school. See, *Rowley*, 458 U.S. at 207-208. Indeed, the Sixth Circuit, interpreting *Rowley*, explained:

> The Act requires that schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student, [while] appellant demands that [school] provide a Cadillac. . . . We hold that the Board is not required to provide a Cadillac and that the proposed IEP is reasonably calculated to provide educational benefits to the appellant, as is, in compliance with the requirements of IDEA.

Doe v. Board Of Education of Tullahoma City Schools, 9 F.3d 455, 456-60 (6th Cir. 1993). Furthermore, "while educational progress is

important, IDEA does not require maximizing goals." *Metropolitan Nashville and Davidson County School v. Guest*, 90 F. Supp. 905, 910, (6th Cir.,1995) citing *Tullahoma*, 9 F.3d at 459.

As pointed out by the school district in their brief "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." See, School District's Brief at 5, citing to *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). IHO Freda simply concluded that [STUDENT] would benefit educationally from the Pleasant Valley Elementary School placement, the less restrictive public program, as well as the Private School, the more restrictive private program and, accordingly, the school district did not have to choose to fund the private program to provide a FAPE to [STUDENT].

Furthermore, although deference is given to IHO Freda in her consideration of the sufficiency and weight of the evidence to determine whether [STUDENT] required a smaller classroom or even a one-to-one instruction plan, a *de novo* review of the testimony of both parent and school district witnesses overwhelmingly supports IHO Freda's conclusion that [STUDENT] does not require a one on one instruction or very small classroom environment. To the contrary, the witnesses agreed that [STUDENT] [31] could, should, and would be successful in a more social environment that included his own peers as well as higher functioning and normally developing peers. In fact, there was

no evidence to support [STUDENT]'s need to regress from the Achievement Center's small classes to the even smaller, more restrictive classes and lesser social interactions ("exclusively one on one) at the Private School.

While it may be parents' belief that "it is not appropriate or fair that parents be asked to prove that education cannot take place with more children present" it is nonetheless the law under well-settled case law and IDEA when parents are seeking public funds for a private school placement. IHO Ex. 19 (Parents' Statement of Issues). That is, it is the school district's responsibility to provide FAPE; the parents disagreement or dislike of the programs chosen by the school district are not sufficient reasons to require that the school district pay for a private education of the parents' choosing; the school district must simply provide *some* educational benefit for the child. See, *Rowley, 458 U.S. at 208*. Furthermore, "when consensus is not possible, the ultimate responsibility for the provision of FAPE to a student rests with the school district." 34 C.F.R. § 300 Append. C, Question 9; See, IHO Decision at 30, ¶ G.

Thus, IHO Freda did not abuse her discretion in weighing the sufficiency and credibility of the evidence; finding that [STUDENT] could be educated at the Parma public schools was well supported in law and fact and was not clearly erroneous. Accordingly, IHO Freda did not err in determining that [STUDENT] does not

require a smaller classes or the mostly one on one instruction in the environment of the Private School.

[32] **D. Methodology**

The parents also argue that the "IHO erred when she minimized the importance of the current TEACCH methodology used with [STUDENT] and failed to recognize the inadequate effort made by the Parma Schools to certify an instructor in that methodology." Parents' Appeal Brief at 6, ¶ 4. The parents also point out that the IHO "rightfully points out that Parma is not mandated to use the TEACCH methodology: and that the IHO "rightly points out that the method of instruction is within the province of the school district." Id. at 6-7, *citing, Lachman v. Illinois State of Educ.*, 853 F.2d 290 (7th Cir., 1988).

Methodology decisions as well as appropriate personnel and training are all issues that are properly left to the discretion of the school district. See, *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998). Indeed, the Sixth Circuit has warned that, "[p]laintiffs are not entitled to prescribe or require a specific desired methodology." *Renner v. Board of Education of the Public Schools or the City of Ann Arbor*, 185 F.3d 635, 645 (6th Cir. 1999) (citing to *Rowley*, 458 U.S. at 208).

Notwithstanding the fact that the parents agree with the IHO's legal standard regarding the school district's right to choose methodology, the parents nonetheless craft a sort of "good Samaritan" type argument that *because* Parma tried to adopt and incorporate the TEACCH method, then they are now responsible for completing the training and perfecting the TEACCH method to match to competencies of the TEACCH educators at the Achievement Center and Private School. See, Parents' Appeal Brief at 7. Thus, they argue, the IHO erred when she "failed to recognize the inadequate effort made by the Parma Schools to certify an instructor in [TEACCH] methodology." Id. at 6.

[33] Of course, parents did not and could not cite to any authority to support the proposition that even though a school district has the discretion to choose a methodology, once they start training individuals in a certain methodology, then the training must be superior and not "slip shod," "inadequate," or "inferior" as compared with other programs using the methodology. Id. at 6-7. Certainly, this argument is completely without merit and unfounded in law.

Additionally, parents try to suggest that because the IHO "accepted throughout her decision the fact that [STUDENT] had made great progress educationally while at the Achievement Center" then the IHO must also accept that the TEACCH methodology must be provided for [STUDENT]

because the Achievement Center used TEACCH. Id. at 6. In fact, as the school district pointed out in their brief, the Achievement Center "use[s] a variety of methodologies including TEACCH, floor time, and applied behavior analysis." School District Brief at 2, citing to Tr. 413; "Ms. Gerber [[STUDENT]'s lead teacher at the Achievement Center] testified that the use of several methodologies was helpful." Tr. 429 (Gerber) (various methodologies incorporated at the Achievement Center included TEACCH, floor time, PECS). Indeed, Ms. Gerber stated that [STUDENT] did not need a specific methodology to succeed; rather, he required a structured system to help him maintain his focus. IHO Decision at 16, ¶ 68 citing Gerber jr. 432-33); See, also, IHO Decision at 27, ¶ 134, citing Foley jr. 360).

Again, no authority is cited for the legal standard that when a particular methodology used at one school results in educational success, then that methodology must be provided at a subsequent school placement. To the contrary, as *Renner* warned, parents are not entitled to require a particular methodology, even if such methodology has [34]been shown to be successful. See, *Renner*, 185 F.3d at 645, citing *Rowley*, 458 U.S. at 208. Thus, the argument that [STUDENT] must attend a facility that employs the TEACCH methodology is based only upon a faulty logical assumption and is contrary to well-settled law regarding methodology determinations.

Therefore, the parents have not shown that the IHO erred when she "minimized the importance" of employing the TEACCH methodology in providing a FAPE for [STUDENT]. In fact, to the contrary, a review of the record does not support the conclusion that [STUDENT] needs the specific TEACCH methodology to succeed educationally; in fact, the witnesses all agreed that only something "like" TEACCH would be a good program approach to [STUDENT]'s education. See, IHO Decision at 16, ¶ 68 citing Gerber (Tr. 432-33); at 27, ¶ 134, citing Foley (Tr. 360). Further, IHO Freda was in the most "unique" position to judge the credibility of the witnesses; thus, IHO Freda did not abuse her discretion by deferring the methodology decisions to the school district. Accordingly, the IHO's decision is affirmed in determining that the specific TEACCH methodology is not a requirement for [STUDENT]'s education under IDEA.

D. Dr. Levinson's Testimony

Finally, the parents argue that the "IHO erred when she disregarded Dr. Morris Levinsohn's medical diagnosis on the basis of a lack of contact with the child and lack of observation of the child in the classroom." See, Parents Appeal Brief at 7, ¶ 5. Further, the parents argue that the "IHO was not qualified to disregard Dr. Levinsohn's medical diagnosis." Id.

[35]The parents agree that Dr. Levinsohn had not seen [STUDENT] in class; but, rather that Dr. Levinsohn had seen [STUDENT] in his office for four lengthy visits (forty to ninety minutes each) over a three year period and, in addition, on several casual occasions because [STUDENT]'s mother works in the same facility as Dr. Levinsohn. Id. at 7-8. The parents argue, then, that the IHO erred in considering that Dr. Levinsohn's contact with [STUDENT] was only "minimal" because, as compared with other witnesses, Dr. Levinsohn's interactions with [STUDENT] amounted to more time and more knowledge about [STUDENT] than "any of the Parma educators." Id. at 8.

Nonetheless, in challenging the credibility of witnesses, the IHO, as the fact- finder, has the "unique opportunity of observe the demeanor of the witnesses" and, thus, is in the best position of deciding whether such a particular witness is credible or not. *Brock v. L.E. Myers Co., Hight Voltage Dist.*, 818 F.2d 1270, 1279 (6th Cir., 1987). A review officer, then, "defers to the hearing officer's factual findings based on credibility judgments about the witness presented at the hearing." *Carlisle Area School*, 62 F.3d at 537, citing to *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); See, also, Fed. R. Civ. P. 52 (a).

Therefore, when reviewing a fact-finder's determination on the credibility or believability of a witness, without significant evidence to the contrary, the impressions and opinions as to the

credibility and reliability of testimony is given substantial deference to the finder of fact and the reviewing decision-maker should not overturn, "unless the record in its entirety would compel a contrary conclusion." *Carlisle Area School*, 62 F.3d at 537; See, also, *Thomas* 918 F.2d at 624. That is, when the IHO has the discretion to make the determination complained of by the Parents, including judging the [36]sufficiency and weight of the evidence, the review standard is to give deference to the IHO unless it can be demonstrated, by the party raising the issue on appeal, that such judgments were clearly erroneous. *Id.*

It is concluded that IHO Freda did not deprive [STUDENT] of educational opportunity, or cause "positive harm" to the parents because she did not adopt an educational recommendation from the student's treating physician. Accordingly, this assignment of error is also found to be without merit.

In addition, parents complain that although Dr. Levinsohn recently diagnosed [STUDENT] with disruptive behavior disorder, a diagnosis that parents believed further supported [STUDENT]'s need for one-to-one instruction, "unbelievably the IHO dismissed this diagnosis as lacking a 'high degree of credibility.'" See, Parents' Appeal Brief at 8. To support their argument, parents offer only this statement: "While the IHO certainly is a qualified lawyer, well versed in the law, it is

doubtful that she possess a medical degree and the medical experience to disregard a specific diagnosis of a medical condition from a physician with over twenty-five year of experience working with children in need." Id.

Parents do not offer a cite to the decision where IHO Freda made such offending conclusions that would have required her to have a medical degree; nor do parents even offer citations to the record where Dr. Levinsohn's testimony would compel a decision or judgment contrary to those made by IHO Freda. Perhaps more significantly, parents do not offer any evidence regarding the educational impact of the disruptive behavior disorder diagnosis on [STUDENT]'s educational needs.[8]

[37]In fact, IHO Freda completely considered Dr. Levinsohn's new diagnosis and concluded that because there were no new assessments conducted and that the diagnosis was predicated on [STUDENT]'s historical profile and information

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[8] Because the diagnosis of disruptive behavior disorder is a relatively new diagnosis and was not considered at the IEP team meeting, June 2, 2003, parents can ask to convene the IEP team so that the new diagnosis can be considered and the parents can bring their concerns to the IEP team. In addition, the new diagnosis should be considered when the FBA is conducted (previously scheduled for September 30, 2003).

provided by the parents, the new diagnosis carried little weight in the determination of whether the school district provided FAPE. IHO Decision at 51-54. In addition, IHO Freda appropriately concluded that the mere existence of a diagnosis does not lead to any particular conclusions regarding the education of a child. See, School District's Brief at 18, citing 20 U.S.C. § 1400 (d)(1)(A), 34 C.F.R. § 300.347 (a)(2)(i). Thus, the argument that the "IHO was not qualified to disregard Dr. Levinsohn's medical diagnosis" is merely a statement of opinion of no legal substance and little value other than to belittle IHO Freda.

Indeed, to the contrary, the IHO is quite qualified to consider the weight and sufficiency of expert witness testimony, including physicians, as it relates to *the educational needs* of a child. Likewise, the IEP team is qualified to consider the medical opinions of physicians when designing an appropriate IEP for the *educational needs* of a child. See, 34 C.F.R § 344 (IEP team). In neither case, do the lawyers, hearing officers, educators, or school officials presume to substitute their opinions for the medical opinion; rather, in determining an appropriate educational program for a particular child, all opinions, including medical opinions are considered when developing the IEP.

Indeed, the IEP team is purposely formed so that a single individual doesn't make the educational plans for a particular student. 20 U.S.C. § 1414; 34 C.F.R. § 300.347. Thus, Dr.

Levinsohn's recommendations must, under IDEA, be considered along with all [38]the other recommendations; and, certain professional qualifications don't necessarily carry more influence on the process than another. Thus, as pointed out by the school district, an extremely well qualified physician may not have as much practical or effective advice regarding a child's daily school needs as the teacher who spends each day in school with the child and knows first hand what has and has not worked for that child. School District's Brief at 16.

In any case, the IEP team members and hearing officers do not need a medical degree to consider the relevancy, impact, or importance of the medical opinion on the educational needs of the child. Likewise, the medical professional does not need a teaching degree or law degree to make educational suggestions subsequent to his medical opinion about a particular child. In fact, IDEA was enacted to avoid such categorical determinations regarding a child's need for educational services; the underlying purpose of IDEA is to assure individualized services for each child regardless of the particular diagnosis. 20 U. S.C. § 1400 (c) (d).

Thus, when the *educational* suggestions of the medical professional are considered but not implemented by the IEP team and/or not found persuasive by the IHO, there is no error unless a party can demonstrate that the *educational suggestions* made by the medical professional (or

any other professional) were completely disregarded by the IHO in determining whether the IEP would provide a FAPE to the student. The parents have not demonstrated that IHO Freda completely disregarded the opinions of Dr. Levinsohn; the parents have simply shown that in considering [STUDENT]'s need for one to one instruction and music therapy, IHO Freda relied upon the weight and sufficiency of testimony of the "Parma educators" (as well as the Achievement Center [39] educators), over the testimony of Dr. Levinsohn where they believe that Dr. Levinsohn's testimony should have carried more weight. Parents' Brief at 8. See, IHO Decision at ¶¶ 28-142 (Findings of Fact).

Indeed, had Dr. Levinsohn had, in fact, suggested that [STUDENT] had an absolute need for one-to-one instruction, he would have been alone in opinion; from a review of the record, Dr. Levinsohn's sole opinion could not have outweighed all of the other witnesses who believed, in varying degrees, that [STUDENT] was benefiting from increased group interactions and increased social opportunities and did not need exclusive one-to-one instruction without learning peer social skills. See, § C, *supra*.

Finally, and significantly, parents suggest, in a footnote, that Dr. Levinsohn did not merely suggest that one-to-one instruction would be the "ideal or optimum program needed for [STUDENT]'s educational success but that this

was required for any educational success." See, Parents' Brief at 7, fn 1. The parents offer no citations to the record nor quote any of Dr. Levinsohn's testimony to support this statement. On the other hand, in her decision, IHO Freda quoted Dr. Levinsohn as testifying that one-on- one instruction would be the "best case" for [STUDENT]. See, IHO Decision at 52; at 18, ¶ 82 jr. 342); *cf.* Bd. Ex. 9 (Letter from Dr. Levinson, April 2, 2003) ("very strong medical recommendation that [the child] is clearly in need of a very intensive and comprehensive program to include continued speech, occupational, physical and musical therapy.")[9] After properly and thoroughly considering Dr. Levinsohn's opinion along with all of the other witnesses, IHO Freda determined that while one-to-one instruction might be a superior educational opportunity for [STUDENT], small group instruction [40]would also offer [STUDENT] appropriate educational opportunities for success as required under IDEA. See, IHO Decision at 42-45.

In reviewing the transcript, the IHO did not misquote Dr. Levinson. See, Tr 342. Thus, the IHO's determination that Dr. Levinsohn was offering a "best case" scenario for [STUDENT] is supported in the testimony on the record. Likewise,

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[9] As noted by the School District, Dr Levinsohn did not mention [STUDENT]'s need for one-to-one instruction in the April 2, 2003 letter. Post-Hearing Brief of School District at 42, fn 149.

IHO Freda did not "disregard" Dr. Levinsohn's opinion; to the contrary IHO Freda thoroughly considered all testimony, opinions, and documents in determining whether [STUDENT] needed one-on-one instruction in order to receive a FAPE. See, IHO Decision at 31, ¶ L; at 51-54. Therefore, IHO Freda did not abuse her discretion, nor were her decisions clearly erroneous in determining, after considering the weight and sufficiency of all of the evidence including Dr. Levinsohn's medical opinions, that [STUDENT] did not require only one-on-one instruction for any appropriate educational success. Accordingly, the assignment of error that IHO Freda erred in "disregarding" Dr. Levinsohn's testimony and that she was "not qualified" to disregard Dr.Levinsohn's testimony is without merit.

III. Relief

In their Conclusion, along with requesting a reversal of the IHO decision, the parents ask that "Parma Schools be directed by the State of Ohio to reimburse Private School for the education of [STUDENT] [W]'s.[10] See, Parents' Appeal Brief at 9, ¶ "Conclusion."

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[10] The Parents did not argue an assignment of error or offer evidence to support any reimbursement claims in the appellate brief; appellants simply asked that Private School be reimbursed. See, Appellant's Brief at 9. Indeed, specific fact-finding, including the appropriate notice and proof

[41] The law under IDEA is well settled that reimbursement for the unilateral, unauthorized placement of a child in a private school may be granted to *parents* only if they can prove that the school district has not and could not provide FAPE to their child. See, *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993); see, also 20 U.S.C. § 1413(a) (IDEA 1997 Reauthorization Amendments). To prevail on a reimbursement claim for a private program, the parents have the burden of proving that they first notified the school of their intention to use public funds before enrolling the child in the program, and they must demonstrate both that the school district was not providing the necessary services and that the program selected by the parents was appropriate. *School Comm. Of Burlington v. Department of Ed. Of Mass.*, 471 U.S.

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requirements, regarding any reimbursement claim *for parents* under IDEA is required at the IHO level before SLRO review is appropriate. See, e.g. *Florence*, 510 U.S. at 17. Furthermore, it is uncertain whether parents have the standing and/or whether the administrative process has the jurisdiction to order reimbursement to a third party. Finally, as concluded by IHO Freda, because "a FAPE was offered to the child, it is not necessary to review the program offered at the Private School to determine whether is constitutes an appropriate private placement, nor to address the issue of tuition reimbursement." IHO Decision at 54.

359, 374 (1985); see, *Florence*, 510 U.S. 7 at 15; see, also 20 U.S.C. § 1413(a).

Thus, the requirements under IDEA codified the decision in *Florence* which emphasized that the parents who do choose to unilaterally enroll their child at the private placement, without the agreement of the school district, act at their own financial risk and must bear the proof of demonstrating that the public placement is an inappropriate educational placement as defined under IDEA. *Id.*

Nowhere in the case law is there a suggestion that *if the parents don't think* that the public school district can provide appropriate services *for the upcoming year* then the parents are entitled to enroll their child in a private program that they prefer to the public program and expect the public school to pay for the placement. In other words, the school district has the obligation to provide FAPE; accordingly, the school district has the attendant responsibility to select the appropriate placement. Only when the school [42]district has failed in their obligations and responsibilities to a student may a parent seek reimbursement for a private placement.

Thus, while the courts and IDEA gave the parents the opportunity to seek reimbursement from the school district for a private school placement when their child was in an inappropriate public environment, the parent also assumed a heavy burden to prove that that school district did

not or could not provide FAPE in the public school placement. In other words, the courts and Congress agreed that the private school placement, at the public's expense was to be reserved as a last resort only for those children who the public school district absolutely could not educate under IDEA. Indeed, the courts have continued to warn that the parents cannot dictate to the school district where or how their child is educated and served under their IEP. See, e.g., *Florence*, 510 U.S. 7 at 15; *Burlington*, 471 U.S. at 374.

Here, the parties agree that the Parma Schools have provided FAPE to [STUDENT] for the last two years as a preschooler at the private placement at the Achievement Center. The parents have not, however, clearly demonstrated and proved that Parma *will not* be able to provide FAPE to [STUDENT] as a school age student at the public placement at Pleasant Valley Elementary School. To the contrary, the evidence overwhelmingly supports the conclusion that the Pleasant Valley Elementary School is the appropriate school age placement for [STUDENT].[11]

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[11] Interestingly, in a very recent case, the court found that when a parent has no *intention* of enrolling their child in the public placement, but has the school district conduct evaluations for the purpose of obtaining reimbursement for a private placement, the parent is not entitled to the reimbursement *even when it was found that the school district could not provide FAPE. Miller v.*

[43]Further, when [STUDENT] first attended preschool at age three, Parma Schools showed quick and appropriate responses to the parents' requests to change [STUDENT]'s environment, ultimately funding [STUDENT]'s placement at the Achievement School. See, Bd. Ex. G, I. J; IHO Decision at 19, ¶ 19, 22. Thus, Parma school district's history suggests that there would be an appropriate response should [STUDENT] need a change in environment to continue to achieve educational success.

Accordingly, the relief requested in Parents' Appellant Brief is denied.

IV. Conclusion

During the hearing, IHO Freda received testimony from no less than twenty witnesses, provided by both parents and the school district, whom were either qualified experts in the field of autism and/or special education or teachers and therapists with direct and personal knowledge of

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San Mateo-Foster City Unified School District, 2004 WL 1161377 (N.D. Cal. May 24, 2004), reasoning that the child suffered no compensable loss; *n.b.* in this court's jurisdiction (9th Circuit), the school district bears the burden of proof. The court emphasized that reimbursement is an "equitable right" under IDEA thus "the conduct of both parties must be reviewed to determine whether relief is appropriate." Id. at 7 (citation omitted).

[STUDENT]. IHO Ex. 24. In her 54-page Decision, IHO Freda carefully and thoroughly considered the qualifications and role of each witness and summarized the relevant testimony regarding each witness's opinions and conclusions about [STUDENT]'s past and current educational progress and his future educational needs. In addition, IHO Freda considered each element of the proposed IEP along with each placement option in the context of [STUDENT]'s past educational successes with Parma City School District's IEP team and the Achievement Center LRE. See, IHO Decision at 38-51, §§ A-E (LRE, one-to-one instruction, speech therapy, occupational therapy, music therapy, and TEACCH methodology).

Further, IHO Freda appropriately applied the *Rowley* factors in reaching her conclusion that the Parma City School District provided a FAPE to [STUDENT]. See, [44]IHO Decision at 33-35. Likewise, IHO Freda correctly assigned the burdens of proof to the parents as required in this jurisdiction as a matter of law. See, IHO Decision at 29, ¶ E; at 32, "Decision"; at 35-36. Further, in concluding that [STUDENT] was provided a FAPE, IHO Freda properly found that the IEP program proposed for [STUDENT] for the 2003-2004 school year appropriately considered the school-age MFE, identified the child's needs for educational progress, established goals and objectives, and established the LRE as required under IDEA, and that the IEP was reasonably

calculated to provide [STUDENT] with an educational benefit. IHO Decision at 32.

In reviewing IHO Freda's findings of facts and conclusions of law, as well as reviewing the transcript and exhibits from the hearing, there is more than ample evidence to support IHO Freda's determination that the Parma School District can provide a FAPE for [STUDENT] in the public school and that the LRE is the Pleasant Valley Elementary School. In fact, using a *de novo* standard, it would be difficult to argue that the Private School is truly the "best" or even appropriate placement for [STUDENT] considering the overwhelming agreement among the witnesses for both parties that [STUDENT] is both academically ready for kindergarten and socially ready for interactions with higher functioning peers.

Having found that each assignment of error is without merit and, further, finding that the Parents offered very scant, unsupported, and unspecific arguments for any of their allegation of procedural or substantive violations that resulted in a denial of FAPE for student, the Parents have not sustained their burden of proof on appeal by demonstrating and proving how the errors they raised were improperly decided in the IHO Final Decision.

[45]Actually, and in fact, regardless of the Parent's failure to adequately or appropriately offer argument and references in support of their assignments of error, the Final Decision of IHO Freda is found to be extremely well reasoned, extraordinarily thorough, and completely supported in relevant law and numerous facts. Accordingly, IHO Freda's Decision is hereby AFFIRMED in its entirety.

IT IS SO ORDERED.

June 2, 2004
DATE

THERESA L. HAGEN, ESQ.
STATE LEVEL REVIEW
OFFICER

cc: Christina Henagen Peer, Esq.
Dr. Donald R. Menefee, Esq.
Arron Gregory, Ohio Dept. of Education

[46] NOTICE OF OPPORTUNITY FOR APPEAL AND RIGHTS FOLLOWING THE STATE LEVEL REVIEW

Appeal Rights after a State Level Review: If you are not satisfied with the final order of the State Level Review Officer, you may appeal such order within forty- five (45) days of receipt of notice of the order to the Court of Common Pleas of the county in which the child's school district of resident is located, under Chapter 119 of the Ohio Revised Code:

OR

You may file an appeal with the federal district court of competent jurisdiction.

May 24, 2004
DATE

THERESA L. HAGEN, ESQ.
STATE LEVEL REVIEW
OFFICER

cc: Christina Henagen Peer, Esq.
Dr. Donald R. Menefee, Esq.
Arron Gregory, Ohio Dept. of Education

[47] CERTIFICATE OF SERVICE

A copy of this decision has been served upon Christina Henagen Peer, of Squire, Sanders & Dempsey, L.L.P., attorney for the Parma City School District, 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114-1304, and Dr. Donald Menefee, attorney for the parents, 22408 Lake Shore Boulevard, Euclid, Ohio 44123 via Federal Express Service on this _____ day of June, 2004.

_____

THERESA L. HAGEN, ESQ.
STATE LEVEL REVIEW OFFICER

[48]CERTIFICATE OF SERVICE

The original decision has been forwarded by Federal Express Service, and a copy of the decision (redacted) has been forwarded by email transmission, on this ___ day of June, 2004 to Arron K. Gregory, Ohio Department of Education, Office for Exceptional Children, 25 South Front Street, Mail Stop 202. Columbus, Ohio 43215.

THERESA L. HAGEN, ESQ.
STATE LEVEL REVIEW OFFICER

STATE OF OHIO
DEPARTMENT OF EDUCATION

In the matter of: Impartial Due Process Hearing on behalf of [the child]	**) Case No. 1328-2003) Joy M. Freda Impartial Hearing**
[PARENTS] Petitioners	**) DECISION (REDACTED)**
-and-	
PARMA CITY SCHOOL DISTRICT BOARD OF EDUCATION Respondent	**)**

PROCEDURAL BACKGROUND

A. **Identifying Information**

1. Impartial Due Process Hearing on behalf of [the child], who currently resides with his parents at [STREET ADDRESS].

2. Dates of Hearing:
October 16, 17, 27, 2003
and November 6, 2003
Initiated by Parents

3. School District:
Parma City School District
Board of Education
726 Ridge Road (County: Cuyahoga)
Parma, Ohio 44129
Dr. Judith Hudgins,
Special Education Supervisor

Christina Henagen Peer,
Attorney for School District
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

4. Parents: [FATHER] and [MOTHER]
[STREET ADDRESS]

[2]Dr. Donald R. Menefee
Attorney for Parents and Child
22408 Lake Shore Boulevard
Euclid, Ohio 44123

5. Date Written Request for
Hearing Received: June 5, 2003

Date Final Decision
Submitted: February 20, 2004

6. Impartial Hearing Officer:

Joy M. Freda, Attorney
6009 Landerhaven Drive, Suite C-1
Cleveland, Ohio 44124-4192
(440) 461-3600

7. Statement of Written Issue from Written Request for Hearing:

Parents requested "an impartial due process hearing in order to challenge the Parma City School district, Cuyahoga County, to provide a free, appropriate, public education for [their] child who has a disability. Parma City Schools do not have a developed autistic program that provides the needed intervention and support for [the child]. Parents are in disagreement with the placement currently being offered in the Pleasant Valley Elementary school for kindergarten as a continuum to the pre-school placement at the Achievement Centers. The child is not being permitted to be in his least restrictive environment. The only possible resolution to this matter is to place [the child] in a specialized autistic program.

8. Statement of Written Issues submitted by

Petitioners on October 14, 2003:

a) The child should continue his education at [Private] School -- an extension of the Achievement Center. The Achievement Center was a placement for the child that Parma Schools supported and helped fund. Although IDEA contains strong preferential language for mainstreaming, the 7th Circuit Court decided that mainstreaming was not appropriate when the regular classroom provided an unsatisfactory education. *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002).

b) It is well established under IDEA that the school district must provide notice of a change of placement. If the parents wish to contest the change of placement, they may file a due process complaint. The parents in this case believe this is an unauthorized change of placement of which they do not approve. The parents have filed due process as their right.

c) When a more restrictive program has been shown to be successful, the burden of justifying a new IEP, including placement, shifts to the school district. *Board of Educ. of the County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D. W. Va., 2000) The parents believe that the previous IEP, set at the Achievement Center and [Private] School, [3]has been very successful. This success, as

well as a previous negative history of [the child] at Parma Schools, establishes that the current placement at [Private School] is appropriate and in the best interests of [the child].

9. Respondent's Statement of Issues and Position:

The sole issue to be decided is whether the least restrictive environment for [the child] is a special education resource room at Pleasant Valley Elementary School or the [Private] School.

It is the District's position that the least restrictive environment for the child is a special education resource room at Pleasant Valley Elementary School as set forth in the proposed 2003-2004 IEP. The IDEA mandates that students be served in their least restrictive environment. Placement at Pleasant Valley will provide [the child] with the opportunity to be exposed to his typically developing peers and typical school routines. This is far less restrictive than a placement at [Private] School where [the child] will not be exposed to typical peers or to a typical school routine. After making excellent progress in the areas of academics, communication, and social skills at the Achievement Center for Children, [the child] is ready to be educated in a typical

elementary school environment where he can benefit from exposure to his typical peers. Therefore, [the child's] least restrictive environment is the resource room at Pleasant Valley, not a separate facility such as [Private] School.

B. Prehearing Procedures

Petitioners served upon Dr. Kurt Stanic, Superintendent of the Parma City School District, a request for an impartial due process hearing on behalf of their son [Student]. The request was received by the Parma City School District on June 9, 2003 (see attachment to IHO Exhibit 1).

The request for a due process hearing was forwarded to Arron Gregory, Educational Consultant, Office of Exceptional Children, State of Ohio, Department of Education. Thereafter, the parents and the school district were provided with the names and resumes of three potential hearing officers. By mutual agreement, Joy M. Freda was selected to serve as impartial hearing officer (hereinafter IHO) for the due process hearing (IHO Exhibit 1).

After receipt of the written notice of appointment in a letter dated June 18, 2003, the IHO contacted the parties by telephone. Thereafter, on June 20, 2003, letters setting forth the rights and responsibilities of the parties in the due process setting were forwarded by the IHO to the

petitioners [the parents] and to Christina Peer of Squire, Sanders & Dempsey, L.L.P., counsel for respondent Parma City School District (IHO Exhibits 2 and 3).

On June 24, 2003, petitioners requested a forty-five (45) day extension of time in order to obtain legal counsel. A thirty (30) day extension of time to August 20, 2003 was granted (IHO Exhibits 5 and 6).

[4]The petitioners retained Dr. Donald R. Menefee to represent their interests in the due process hearing. Thereafter, the parties and their legal counsel engaged in voluntary mediation. Efforts to mediate the issues presented in the request for due process were not successful.

On or about August 12, 2003, a telephone conference was held, involving Donald Menefee, counsel for the petitioners, Christina Peer, counsel for the school district and the IHO. At this time, the dates for the disclosure conference and due process hearing were finalized; and a scheduling order was issued (IHO Exhibit 8).

At the time of the telephone conference, the appropriate stay put placement of the child during the pendency of the action was discussed. Petitioners sought to have the child placed at [Private] School and argued it was an appropriate extension of the curriculum at the Achievement Center, the child's placement during the 2002-2003

school year and during the 2003 summer (ESY) session, while the school district contended stay put should be at the Pleasant Valley Elementary School in the Parma City School District. The parties were directed to attempt to reach an amicable resolution of the disagreement; if none was achieved, briefs were to be submitted to the IHO not later than August 20, 2003. Briefs were received in a timely manner (IHO Exhibits 11 and 12).

On August 28, 2003, the IHO entered an interim order identifying the child's stay-put placement as the Achievement Center for Children - East operated by the Cuyahoga County Educational Service Center (IHO Exhibit 13).

The disclosure conference was held on September 30, 2003 at the Parma City School District Board of Education offices. Present were [the mother], parent of [the child] , Dr. Donald R. Menefee, attorney for the parents and child, Dr. Judith Hudgins, Special Education Supervisor for the Parma City School District, Christina Henagen Peer, of Squire, Sanders & Dempsey, L.L.P., attorney for the school district, and the IHO. The parent indicated she desired a written transcript of the hearing proceedings and a final decision in written format. In addition, a closed hearing was requested, and it was indicated the child would not attend. The parent and school district exchanged witness lists and exhibits (IHO Exhibit 20).

Counsel for the school district waived service of notice by certified mail upon the school district superintendent and individuals included on the district's witness list of the date/time of the hearing and of their anticipated attendance. The parent waived notice by certified mail upon the parents and their witnesses of the date/time of hearing. The parties agreed to cooperate to establish a witness sequence and to advise the IHO of the witness order; it was determined no agenda would be required. The parties discussed the use of telephone conferencing equipment to permit testimony of certain expert witnesses; it was agreed this mode of appearance would be permitted in limited circumstances (IHO Exhibit 20).

C. **Post-Hearing Procedures:**

On the final day of hearing, petitioners sought to introduce the telephonic testimony of Toni Giannone, the consultant who designed the [Private] School program, in rebuttal of testimony given by Dr. Newlin that the school was not an appropriate setting for autistic children. Counsel [5]for the school district objected to the introduction of the testimony, as she recalled Dr. Newlin's statements to be confined to the propriety of the program for the child, based on her knowledge of him and his specific needs, and not as addressing the manner in which the school served the needs of autistic children in general. Inasmuch as it was not possible to access the actual transcript of Dr. Newlin's testimony, the testimony

was introduced, with the proviso that, after the transcripts were received and reviewed by the parties, a motion to strike could be filed and would be ruled on in conjunction with the preparation of the decision in this matter.

On December 1, 2003, a motion to strike was filed by counsel for the school district. The motion alleged the testimony of Dr. Giannone should not be admitted since (1) petitioners misconstrued the testimony of Dr. Newlin and (2) even if the testimony had opened the door, rebuttal testimony must *rebut*, and respondent does not consider that to be the case here. The specific testimony in question is as follows:

> Q. How would you possibly know that since you haven't been involved with that [[the child's] IEP] since 12/20/01?
>
> A. Because of what I know about what's good programming for children with autism. Q. So that's a generalized statement for autistic kids?
>
> A. Right.
>
> Q. Not specifically for [the child] , but for autistic kids?
>
> A. For autistic kids, right. (Tr. 612-13)

Frankly, it is a close question as to both

points raised by respondent. Regrettably, the intent of Dr. Newlin is not quite as clear as one would like. Assuming, therefore, that the door was open to rebuttal, the testimony of Ms. Giannone establishes the rationale for the segregated setting utilized at [Private] school. The intent of the testimony was to validate the model for the program and not to dispute the specifics. For the foregoing reasons, the motion to strike is overruled.

FINDINGS OF FACT

Relating to Due Process Procedures:

1. Petitioners were provided a list of three hearing officers and their qualifications from the Ohio Department of Education (Tr. 10).

2. Petitioners received written notice of the time and place of the due process hearing in a language and form understandable to them (Tr. 10).

3. Petitioners received a document listing their rights relating to the hearing in a language and form understandable to them. Petitioners read the document, and no interpretation by others was required (Tr. 10).

4. Petitioners were informed of the potential

availability of free or low cost legal and other relevant services in the area (Tr.11).

5. Petitioners received a copy of the brochure entitled "Whose IDEA is This?" (Tr. 11).

6. Petitioners and their legal representative were granted access to their child's educational records; and no copying fee effectively prevented the parents from exercising their right to inspect and review the records (Tr. 11).

7. Petitioners were aware of all documents to be presented and names of representatives and witnesses who would appear at this hearing at least five days prior to hearing (Tr. 12).

8. Petitioners requested the hearing to be closed and asked for a written transcript and decision (Tr. 12).

9. Respondent cooperated to the extent necessary to assure the petitioners were accorded the pre-hearing due process procedures outlined in items 1 through 8 above (Tr. 11-12).

10. Respondent was aware of all documents to be presented and names of representatives and witnesses who would appear at this hearing at least five days prior to hearing

(Tr. 13).

Relating to the Testimony and Exhibits:

11. The child is currently []years old (d.o.b.). He is the youngest of five children born to his parents (Tr. 16).

12. During his first year, the child was in and out of the hospital. Initially, he appeared to experience some breathing difficulties and was ultimately diagnosed with apnea. He also had frequent choking spells and, based on a modified barium swallow, it was determined he was aspirating roughly 50 per cent of his food intake. The problems were minimal so long as the child was breast fed. However, once he was introduced to solid foods, the child suffered repeated bouts of pneumonia. A battery of tests was performed; and the condition was identified as a tracheal malacia and determined to be primarily neurological in origin. Treatment consisted of occupational therapy to strengthen the muscles of the trachea. It should be noted the school-age evaluation team report indicates the existence of a tracheoesophogeal cleft that was surgically repaired prior to one year of age. (Tr. 16-18, Respondent's Exhibit C, 023).

13. At one year, an endoscopy was performed to determine if a hole or other abnormal

condition existed in the trachea. The results were normal; however, during thistimeframe, the occupational therapist at University Hospital indicated to the mother that the child had some "missing developmental milestones", including lack of eye contact and words (Tr. 18-19).

14. At age two, the child was evaluated for occupational therapy and speech. The evaluation found significant signs of autism. As a result, a home program was initiated; and the child received intensive therapies (Tr. 19-20).

[7]15. The child's parents contacted the Parma City School District, their district of residence, to conduct a multifactored evaluation in order to establish eligibility for services under the IDEA and to provide for uninterrupted interventions once the child turned three (Tr. 20)

16. At age 3, the child was enrolled in the Parma City Schools' morning preschool program. (Tr. 20).

17. At the time of enrollment, the child was daytime potty trained and had started to utilize some words and gestures, particularly to address his needs (Tr. 21).

18. [the child] had problems sleeping through the night on a regular basis, and it was frequently difficult to get him up in the morning. Also, once he started school, the child "lost his potty training completely" and began developing severe bowel obstructions (Tr. 21).

19. [The child's] mother contacted Dr. Newlin, then supervisor of the school district's Special Education Department, and requested the child be placed in the afternoon program. He started the afternoon program in February, 2001; but the anticipated improvement in at- home behaviors did not materialize. However, the school reported the child was "doing fine, ...mastering, ...following through with the IEP" (Tr. 22-23).

20. After attending a school play in which the child was scheduled to perform and observing the child "under the table, screaming, red, hands on the ears, and not participating" -- a conduct that continued for ten to fifteen minutes until the parent took the child home -- the mother scheduled an observation during a regular school day. During the course of observation, she discovered there was an aide in the classroom who described her duties as to assist the child and to insure he did not harm himself or others. Also, the child was not transitioning

well from one activity to another; and attempts to force him to transition were met with screaming and recalcitrance (Tr. 24-27).

21. At this time, [the child] was also attending regularly-scheduled private sessions of occupational therapy, speech therapy and behavioral therapy which were paid for by his parents. The parents have continued to provide such therapies to this day (Tr. 29-30,).

22. After discussions with Dr. Newlin and research of alternative programs, it was agreed the child would attend the Achievement Centers, with the costs to be borne by the Parma City Schools. The child began at the Achievement Centers in approximately July, 2001, at the age of four (Tr. 29, 31, 36).

23. The parent depicted the first year of attendance at the Achievement Centers as one in which the school was "basically trying to get [the child] comfortable with going to school, following a routine, learning that he had things that were expected from him and he needed to do them and being able to stay in the classroom" (Tr. 32)

[8]24. The IEP addendum governing provision of services at the Achievement Center for the 2001-2002 school year was completed on

December 21, 2001; needed services identified consisted of 90 minutes of speech language pathology per week (60 minutes individual and 30 minutes small group) and 90 minutes of occupational therapy per week similarly divided. Special education preschool teacher and teacher assistants for 27.5 hours per week were also listed in this column. Least restrictive environment was determined to be a "specialized program for preschool children with intensive communication and social needs at Achievement Centers for Children (East)". At a later date, i.e., on or about May, 2002, music therapy was incorporated as a needed service for 30 minutes a week, with transition to small group. In a subsequent IEP dated October 9, 2002, the music therapy was modified to 15 minutes per week, with an additional 15 minutes per week consultative services (Respondent's Exhibits G, I).

25. During his second year at the Achievement Centers, the child demonstrated developmental progress in several areas. He began to use more words and to express himself in three to four word sentences. When choices were offered, he was frequently able to accept one of the options given rather than "having a behavior". He responded well to the structured nature of the TEACCH methodology and completed assigned tasks

regularly. Finally, he was getting kindergarten ready; specifically, the program was focusing on needed prekindergarten skills and the child was responding positively (Tr. 38- 40).

26. The "Summary of Progress" covering the period September, 2001 to May 6, 2003, prepared by Jacqueline Gerber, Lead Teacher, Achievement Centers, reflects the child made great strides in the areas of pre-academic and social/play skills. Specifically, when assessed in September, 2002, i.e., at the start of his second year at the Achievement Centers' program, he had mastered 80 per cent of the TEACCH preschool curriculum guide -- cognitive/readiness skills section, and also demonstrated the ability to retain and generalize skills. With respect to social/play skills, the child was able to follow the lead of an adult and carry out a back and forth engagement of the adult's ideas during play. He also attempted to do this with a peer but required adult supervision and prompting to continue the play (Respondent's Exhibit N, 181-182).

27. Petitioner consented to the IEPs offered by Parma City Schools for the 2001-2002 and 2002-2003 school years. The child's IEPs for the 2001-2002 and 2002-2003 school years specify at "Reason for Placement in Separate Facility" the child's need for

"specialized supports for behavior and academics that aren't available in a public school setting." (Tr. 85, Respondent's Ex. I, J).

28. On January 27, 2003, A "School Age Planning Form: Reevaluation" was prepared by Roberta Beeler, school psychologist, Yvette Newlin, Special Education Supervisor, and [the father], Parent. At the same time, the father was provided with the "Written Notice to Parents" form that specified the evaluation was necessary due to the child's transitioning from preschool to school age. The father executed the parental consent form (Tr. 115-116, Respondent's Exhibit C).

[9]29. Roberta Beeler has been a school psychologist in the Parma system since 1991. She holds a bachelor of science degree in elementary education and a master's degree in school psychology, both from Wayne State University. She has approximately 23 years' total experience in the field. Ms. Beeler holds permanent certification as a school psychologist from the state of Ohio and is also nationally certified in her field. Ms. Beeler described the Vineland Adaptive Behavior Scales as a measurement that demonstrate how a child functions in the specified areas listed in comparison to other

children of the same chronological age. A review of the child's scores indicates age appropriate motor skills, moderate delays in daily living skills and socialization, and delays in communication skills that were "on the cusp of being... significant " (Tr. 117-120).

30. In response to a query regarding the child's readiness for academics, Ms. Beeler stated the information provided by Jacqueline Gerber, the child's lead teacher, in completing the Kindergarten Admission Scale provided a "very strong indication of readiness". In addition, the scale was completed in February 2003, and it is likely the child would have shown further growth had the test been conducted during the summer. Ms. Beeler also noted the mother completed the same document. A comparison of the two scales revealed many areas of similarity. Overall, however, it appeared that the child was demonstrating more skills in the classroom setting than he might have demonstrated at home. Ms. Beeler stated it is not unusual to see variances between how a parent rates a child and how a teacher rates a child (Tr. 121-123. 136).

31. The school-age multifactored evaluation was completed and signed on May 6, 2003. Based on the data gathered for the multifactored evaluation, the MFE team

determined the child continued to have a disability, to-wit: autism; and the disability condition had an adverse effect upon the child's educational performance. The team set forth the following implications for instruction and progress monitoring:

> Consider continuation of the TEACCH methodology for [the child's] academic learning.
>
> [The child] focuses more in a structured area that is organized with limited auditory and visual distractions.
>
> Utilize high motivators (which are constantly changing).
>
> Continue positive reinforcement while working.
>
> [The child] enjoys adult interaction and will gather himself during a meltdown if he assumes that he will be left alone with no one to work with him.
>
> Provide a setting that has a consistent schedule as well as reminders or warnings when there is a change to the routine.
>
> [The child] responds well to heavy work and proprioceptive activities throughout

the day.

> He would benefit from additional opportunities to practice fine-motor skills and visual perceptual tasks needed for school and self-care. (Respondent's Exhibit C, 084).

[10]32. Although the child's progress on goals and objectives set forth in the 2002-2003 IEP were reviewed, no substantive discussion of the child's IEP for the upcoming school year was conducted on May 6, 2003. An IEP meeting was held on June 2, 2003, at which time a placement in Parma City Schools was offered. The parent described the program as one- half day in a smaller classroom with a special education teacher and one-half day in a regular kindergarten with an aide. Related services identified in the IEP were sixty minutes of speech therapy per week and occupational therapy, with the specific time allocated to be determined after an evaluation of present skills by the occupational therapist. There was no music therapy and no family continuum. On cross-examination, the mother iterated her belief that the IEP provided for one-half day placement with an aide in a regular education kindergarten classroom consisting of 20+ students. When queried again later, the mother acknowledged recollection of a discussion that the child would be placed in a

self-contained classroom for six hours at the outset, but then would have opportunities to transition into a regular education kindergarten as appropriate (Tr. 41-42, 77, 91-92).

33. The IEP team consisted of the child's mother, Dr. Judith Hudgins, Director of Special Education for the school district, Jacqueline Gerber, the child's lead teacher at the Achievement Centers, Amy Lumadue, mental health therapist from Beechbrook, Michelle Munici, speech language pathologist with the school district, Julie Peacock, occupational therapist with the school district, and Julie d'Aliberti and Kim Tomco, special education teachers with the school district. The name of the final signator to the IEP is illegible; however, it may have been Scott, the family liaison employed by the Achievement Centers (Respondent's Exhibit K).

33.[sic][The child's] parents and the school district could not reach an agreement as to [the child's] needs.

34. The IEP document, at the signature page states at the top "06/02/03 Participation Only". The parents prepared an attachment to the IEP approximately 1.5 pages in length addressing their perception of the child's needs and present levels of performance. The

document concludes with the following statement: "[the child] needs to continue in a specialized program until he is able to work more independently, make the right choices, increase his intelligible speech, increase his attention to stay on task with activities with less motivation...." The mother testified the Parent Attachment to IEP was prepared as a form of prior written notice to the school district. The parent discussed the information contained in the Parent Attachment during the course of the meeting. At the consent block on the final page of the IEP, the parent signed and dated the form after marking the second block which states "I give consent to initiate special education and related services specified in this IEP except for LRE" (Tr. 43, 68-69, Respondent's Exhibit K).

35. The school district provided a "Written Notice to Parents" form dated June 2, 2003, relating to a proposal to change placement. Under "Description of Action", the form indicates the "parent disagreed with offer of 6-hour classroom in public school setting with self-contained special education instruction for kindergarten. Parent wants specialized autistic program out of district" (Respondent's Exhibit P).

[11]36. The mother declined to observe the classroom setting or the teacher proposed by the school district as part of the

appropriate placement for the child. The mother stated she had observed the full-day kindergarten for special education students in 1999 or 2000 in contemplation of the possibility of her older daughter being placed in that setting and did not consider it necessary to do so again (Tr. 82, 89)

37. The parents requested due process on June 5, 2003. At the conclusion of the IEP meeting on June 2, 2003, the mother concluded it was not possible for all IEP team participants to agree on the appropriate least restrictive environment for the child. The parents believed the child required placement in a specialized autistic program. At the time of the IEP meeting, mother had presented the Parent Attachment to Dr. Hudgins and asked her to indicate she agreed or disagreed with its contents and affix her signature. Dr. Hudgins, Director of Special Education, refused to sign. The parent stated: "I just felt we were never going to agree. We just could not agree. We couldn't agree on how much he needed, what he needed, why he needed it." (Respondent's Exhibit A, IHO Exhibit 1, Tr. 43-44).

38. As early as February, 2003, the parents had expressed interest in investigating alternative placement options for the child for the 2003-2004 school year and had mentioned this fact to Dr. Judith Hudgins.

Although the mother denies it, the parent apparently indicated to the child's private speech therapist in March, 2003, that she desired her child continue his education at [Private] School. In May, 2003, there was discussion as to the possibility of a startup autistic program in the Parma City School District; however, it was apparently delayed or cancelled due to budgetary concerns and the hiring of a new superintendent. In the interim, the parent was identifying other program options and had contacted [Private] School for literature (Tr. 30, 47, 77, 81).

39. The child was enrolled by the parents at the [Private] School for the 2003-2004 school year. The school brochure indicates it is designed to provide the highest quality of individualized programming for children with autism spectrum disorder. The ultimate goal of the program is to transition the students back to their home school district (Tr. 48- 50, 195, Petitioners' Exhibit 6).

40. Deborah Mandell serves as the director of [Private] School. She has been employed at the facility for three years in an administrative capacity. Prior to her employment at [Private], she served as director of a child evaluations center at Cooper Hospital in New Jersey for 12 to 14 years. Ms. Mandell holds an undergraduate degree from the University of Pennsylvania

in occupational therapy and a master's degree from St. Joseph's University in Pennsylvania. Ms. Mandell is hopeful the child can be transitioned back to his home school as early as next year. (Tr. 192-194, 202).

41. Ms. Mandell stated the [Private] program currently serves 23 autistic children and employs 26 full-time staff members. Tuition is $56,000 per year for daytime instruction, excluding transportation. The child is currently receiving a financial grant renewable in [12] 12-week segments that significantly reduces the family contribution. In addition, the family is required to provide transportation (Tr. 75, 194-196).

42. The admissions process at [Private] does not incorporate formal assessments. In this instance, Ms. Mandell and Dr. Howard Chane, a team member from Boston, Massachusetts, who visits on a weekly basis, met with the child and the family. The determination to admit was based principally on "conversations with the family, their concerns about [the child], his present levels at the time, their goals for him". Ms. Mandell stated none of the final progress summaries prepared by Achievement Centers was reviewed prior to admission. She could not recall whether she had viewed the school age MFE at that time (Tr. 204-207).

43. Mr. Mandell represented every student enrolled in the school initially receives instruction in a one-on-one environment. The child's day at [Private] consists of the following sessions: (a) 30 minutes of individualized speech therapy; (b) one hour of individualized academics focusing on language arts, social studies and reading, (c) 30 minutes of individualized speech therapy, (d) social recess group, involving six to seven children and three staff members, (e) small lunch group, with one other child, (f) 30 minutes of music therapy, (f) 30 minutes of individualized occupational therapy (three children with three therapists), (g) individualized academic session involving math, and (h) small group academic instruction involving three children total. The child also has gym once a week with a total of four to five children in the class (Tr. 200-201, 204, 226).

44. The structure of the [Private] program provides no opportunities for contact or interaction with typically developing peers (Tr. 208, 222).

45. All children in the [Private] program have a diagnosis on the autism spectrum. Ms. Mandell indicated most of the students were lower functioning than [Student]. There are approximately two or three students

currently enrolled who are higher functioning than the child (Tr. 203, 228-229).

46. Ms. Mandell identified the child's needs to include (a) learning how to learn, (b) an intensive language-based program, (c) the intensive structure of a one-on-one environment, and (d) the opportunity to develop skills so that he can be taught in a larger group and be successful. Ms. Mandell reached these conclusions based on her conversations with the family, her meeting with the child and input from other staff members who met the child (Tr. 198).

47. Ms. Mandell acknowledged the child would have some successes in an instructional setting other than one-on-one -- specifically a classroom with five to seven children. "[H]e would learn but would learn less, and I think he would not feel like a successful learner" (Tr. 199).

48. Lillian McNulty is an occupational therapist at University Hospitals; she worked with the child during the period August 1999 - February 2003. Occupational therapy sessions focused on sensory motor activities, self-help skills and fine motor play skills. As therapy [13]progressed, the child was able to choose and seek out sensory-based activities on his own. The therapist structured the fine motor play activity to insure the appropriate

goals were being addressed; however, the child was given choices, such as "do you want to string beads or do you want to cut with scissors?" (Tr. 100-101).

49. The progress reports/notes provided for the University Hospitals of Cleveland occupational therapy sessions were not complete, and the therapist could not recall if the child had met the goals established. Ms. McNulty described kindergarten readiness as requiring fine motor skills such cutting and writing your name, the identification of colors, shapes, managing fasteners, and beginning to shoe tie. Ms. McNulty was unwilling to specify, based either on her personal experience with the child or information provided in the occupational therapy final summary from Achievement Centers dated May 6, 2003, whether the child could be considered to possess the appropriate skills for kindergarten. However, she did acknowledge that, based on the Final Progress Summary, it appeared child had progressed during the period between her final session with the child and May, 2003 (Tr. 103-108, Petitioners' Exhibit 10, Respondents' Exhibit N, 190-191).

50. The occupational therapy final summary from Achievement Centers dated May 6, 2003, indicates that, based on the Peabody Developmental Scales, the child is able to

create block structures, copy shapes from a model and cut more accurately. The TEACCH checklist demonstrates the child's ability to draw simple shapes and manage fasteners. His current IEP goals address many of these needed skills; he is able to color with greater accuracy. The child is beginning to write the letters of his name on a line and is independent with doing this on a chalkboard. He is also more accurate with cutting simple shapes such as a circle. He is able to manipulate zippers, large buttons and snaps with cueing and is beginning to learn shoe tying (Respondents' Exhibit N, 190-191).

51. Ashley K. MacGuire is employed as a speech therapist at University Hospitals. She holds an undergraduate degree from McGill University in Montreal, Canada, and a master's degree from Case Western Reserve in speech pathology. She was hired at University Hospitals immediately after her graduation in 1999. Ms. MacGuire has worked with the child during the following periods: October 2001 - December 2001, January 2002 - November of 2002, and from May 2003 to the present. Initially his sessions were one hour per week; however, more recently he has been scheduled on a biweekly basis. (Tr. 168, 171, 175)

52. Ms. MacGuire describes the child's progress

in therapy as "good". "He is able to answer questions now. He is able to attend better. He is expressly talking in sentences. There is still a long way to go, but he is definitely making huge progress" (Tr. 175-176, 186).

53. Ms. MacGuire stated the child continues to require speech therapy. He experiences difficulties in the following areas: appropriateness of responses, staying on topic, difficulty in turn taking, difficulty expressing his feelings or narrating a story, difficulty with "why" questions although he is starting to answer them, and problems with pronoun usage. Sometimes he races ahead of himself while speaking and reverts to jargon, which [14]is essentially a speech sound or clarity difficulty. This testimony was consistent with that provided by Mary Beth Koss, manager of the education department at the Achievement Center. Ms. Koss indicated that although the child had made significant gains in the area of language communication, strong elements of challenge remain; and speech therapy is a critical element of the child's education (Tr. 176-178, 379-381).

54. The speech therapy notes reflect increased cooperation from the child beginning in October, 2002. He was better able to attend and follow through on activities. At present, the therapist no longer uses hello or good-bye

songs with the child; nor is a picture schedule required to keep the child on task (Tr. 183-184).

55. Amy Lumadue is employed as a mental health therapist at Beech Brook. She received a bachelor's degree from Bethel College in psychology; in addition, she was awarded a master's degree from St. Mary's University, Minneapolis, Minnesota in 1998. Prior to coming to Beech Brook approximately 2.5 years ago, Ms. Lumadue worked with a psychologist as an autism specialist. Her work experience also includes employment in Minnesota as an in-home therapist in the field of autism. Overall, she has worked with autistic children for 13 years. Ms. Lumadue met [the child] as a client in July, 2001; his parents sought assistance in addressing certain specific behavior issues, including temper tantrums, fighting with his sibling and defiance. Her therapy began individually with [the child] and now involves a small group setting depicted as four children and two instructors. Ms. Lumadue typically sees [the child] once a week. (Tr. 240-243, 251)

56. Since Ms. Lumadue has been involved with [Student], she has observed progress and growth in all goal areas. His temper tantrums are less frequent and severe; he has better coping skills, is more adept at problem

solving and is better able to verbalize his needs. He has improved at social interaction; he is able to socialize and communicate with others, and to maintain interaction with other people in order to follow directions, play and attend. Finally, in the area of self-regulation, his ability to control his body, focus and attend to tasks has improved (Tr. 246-247).

57. Ms. Lumadue characterized the child's involvement in settings with more than one child as "going well"; however, she indicated he tended to lose focus when more people were in the room. Ms. Lumadue acknowledged the importance of broadening the child's opportunities to develop his socialization skills in larger group settings because the implementation of life skills typically occurs in an environment "with a lot of people around you". (Tr. 247-250, 255).

58. The Beech Brook Quarterly Review dated January 15, 2003, indicates, at Page 3, that the child began group therapy and "...adjusted quickly to the group format. He was cooperative with activities and interacted with peers, with support from therapist. He has established a reciprocal relationship with one of the other boys in the group, and spontaneously interacts with all peers in the group. He continues to need prompts and visual cues...." However,

the most recent review dated July 15, 2003, reflected inconsistent progress; it noted the child continued to engage in aggressive play and to use behavior to manipulate others to get what he wanted (Respondent's Exhibit V, 347, 343).

[15]59. Jaime Alspach is a music therapist who is presently employed at the Music Therapy Enrichment Center; she provided services to the child under contract with the Achievement Centers. She holds a bachelor's degree in music from Ohio University and is board certified at the national level in music therapy. She defines music therapy as the "therapeutic use of music toward nonmusic goals or aims" (Tr. 143-145).

60. Ms. Alspach worked with the child from September, 2001 through July, 2003. Services were provided once per week for 15 minutes of 1:1 instruction and an additional 15 minutes consultative, where staff members hold a weekly team meeting to discuss classroom strategies including group sessions incorporating music therapy such as circle time (Tr. 145-147, 149).

61. Each student at the Achievement Centers receives the same amount of music therapy on an individual and consultative basis; however, it was included on the child's IEP because anecdotal evidence tended to

indicate the child responded very well to the structure of the music setting. It was not necessary to sing to the child for him to understand the instructions given, although Ms. Alspach opined he seemed to grasp instructions given in song format a little better (Tr. 156-157).

62. Ms. Alspach described the child as a good peer model in group settings. She stated he was very verbal and seemed to enjoy what he was supposed to say. The child also encouraged others to speak or play an instrument. He was willing to share and turn take, two skills that other students lacked at times. Ms. Alspach indicated the child benefited from the social interaction with his peers that he received in group time; and learning to do things within a group was an important skill for the child to learn (Tr. 158-159).

63. Ms. Alspach worked with the child on various kindergarten readiness skills. She recalled use of a calendar song and a weather song to identify different weather conditions and days of the week. They also worked on spatial concepts and body part identification. Although unable to find her chart on which she recorded relevant data, Ms. Alspach stated the kindergarten readiness skills went well; with respect to those specific skills she worked on with the child, he had success (Tr.

153-154).

64. Jacqueline Gerber is a preschool teacher in the autism program at the Achievement Centers. She received an undergraduate degree in early childhood education from Ohio University and a master's degree in the same field from George Mason University. She holds an early intervention specialist certification and is completing the requirements for special education certification. Ms. Gerber has been employed at the Achievement Centers for a total of six years, and has held her current position for the past four years (Tr. 409-410).

65. Staffing at the Achievement Centers consists of a lead teacher, i.e., Ms. Gerber, two assistants, two educational aides, a speech therapist, an occupational therapist and a parent educator. At least four adults -- typically the lead teacher, two educational aides and one of the therapists -- are in the classroom for the full school day (Tr. 384-385).

[16]66. The class is comprised of a maximum of six children, and its overall organization is very structured. After the child has removed his outerwear and settled in, he follows his picture schedule. The first activity addresses gross motor skills and is completed as a group; examples include jumping, balance

beam or an obstacle course. Thereafter, rotations begin. The classroom is divided into discrete areas or stations. Two children go to a TEACCH session accompanied by two adults, and academics are addressed. Two children move to floor time with one adult. Two children visit the sensory fine motor area; in the first rotation, sensory activities typically involve using play dough, silly putty, or similar materials. At the end of 15 minutes, these sessions rotate until each child has completed a full rotation of three stations. At that point, the students are divided into two groups of three; one group has snack and the other participates in circle time. These activities would be followed by a 20-minute outdoor recess, another complete rotation and lunch. The afternoon session would involve one full rotation, circle time, including a good-bye song, and departure (Tr. 415-419).

67. The speech therapist allotted 90 minutes per child per week, and the IEPs of most of the children at the Achievement Centers reflected a 90-minute per week speech-language therapy requirement. Typically, a speech therapist was at Achievement Centers three days a week for the entire day. The format of speech therapy pullouts was at the discretion of the individual therapist. Options included remaining with a child for a full rotation as he cycled through each

activity or actually pulling him out and working with him 1:1 in a segregated environment (Tr. 419-420, 468-469).

68. Ms. Gerber described the various methodologies incorporated in the Achievement Centers program including TEACCH and Floor Time, as well as the use of PECS schedule. On cross-examination, Ms. Gerber acknowledged the child did not necessarily require a specific methodology to succeed; rather, he required a structured system that would help him maintain focus (Tr. 432-433).

69. Depending on the day and the activity, the child could be a peer model for others. His strengths rested in the fact he possessed words and the other children benefited from hearing him using words; also he was developing interactive play skills involving toys (Tr. 438-439).

70. The child demonstrated improvement in the area of transitions, particularly after he was placed on medication during the summer of 2002. Generally, he seemed more relaxed and able to tolerate things. The child's mother testified he had not done well on Paxil, but had responded to Risperdal (Tr. 440-442, 33-33).

71. Although Ms. Gerber reported the child

reacted well to music therapy; she did not utilize song to introduce new concepts or pre-academics to the child. Neither she nor her assistants did much singing with the child. Ms. Gerber stated she was not musically inclined. The child was able to learn the skills she taught in spite of her failure to sing (Tr. 421, 449-450).

[17]72. Ms. Gerber identified the form titled "Cognitive Readiness" Skills" incorporated in the school-age MFE at page 36 as having been completed by her and supplied to the Parma City School District perhaps in February, 2003. She represented that, assuming the skills identified on the checklist are in fact appropriate indicators of kindergarten readiness, the child was prepared for kindergarten (Tr. 457-459).

73. Ms. Gerber was an IEP team member and attended the meeting on June 2, 2003. She participated with Kim Tomco, a special education teacher in the Parma school district, in the creation of some of the goals and objectives of the IEP. Based on her conversations with Ms. Tomco, the meeting discussions and the document, it "sounded fine", i.e., as though the child could be served in a special education classroom in the Parma City School District. However, Ms. Gerber qualified her statement by indicating that, as a mom, she understands

wanting "the best" for your child (Tr. 462-463).

74. Ms. Gerber believed the child would benefit from a school environment with more typical peers, provided the appropriate supports and guidance were available (Tr. 463- 464).

75. Dr. Morris Levinsohn graduated from medical school in 1963 and has practiced his profession with distinction for 33 years. Initially, he focused on pediatrics and then moved into pediatric neurology. Approximately 18 years ago, he became interested in neurobehavioral disorders of children, and particularly autism. Since that time, he has had approximately 2000 patients with autistic spectrum disorder. Dr. Levinsohn initially met the child in November, 2000. His parents expressed concerns related to his behaviors, including temper tantrums, difficulty with transitions, a number of unusual and repetitive body motions, as well as his overall developmental delay, particularly in the area of speech and language (Tr. 307-309).

76. During the period November, 2000 through October, 2003, Dr. Levinsohn saw the child during office visits with his parents a total of four times. The initial visit was at least 90 minutes in length; follow up visits ranged from 40 to 60 minutes. In addition,

he has spoken with the child on at least four additional occasions since April 2, 2003, because Dr. Levinsohn and the child's mother are employed at the same medical facility. During vacation time, the child is often present at the hospital. On average, these informal observations were 15 minutes in duration (Tr. 314-317).

77. Dr. Levinsohn's initial assessment of the child was based on a physical examination, a neurological examination, an interview with the parents and a concurrent observation of the child during the interview process (Tr. 318-319).

78. Dr. Levinsohn was principally involved in administering pharmacotherapeutic agents to modify and modulate some of the child's behaviors (Tr. 312).

79. Dr. Levinson's "firm medical recommendation" with respect to the child included one-on-one interventions, intensive accommodations to include individual speech therapy, [18]individual occupational therapy, and music therapy. He represented one-on-one instruction was critical for the child to succeed in the school setting (Tr. 313-314).

80. On cross-examination, Dr. Levinsohn acknowledged his letter dated April 2, 2003 that incorporated the bulk of the

recommendations set forth in Finding 79 above was "based purely on information provided from his parents". Dr. Levinsohn has never observed the child in a classroom setting, nor has he observed him interact with other children. Dr. Levinsohn responded in a similar vein to a query regarding music therapy; he stated his recommendation was not based on personal observation; rather, the parents report the child "...loves music, enjoys music. It quiets him down. It restores some sort of order for him. In that musical setting, he seems to show far fewer of the aberrant behaviors described in the past" (Tr. 323, 326, 332, Petitioner's Exhibit 9, 77-78).

81. Dr. Levinsohn recently diagnosed the child to have a disruptive behavior disorder, based on his emerging aggressive behaviors, oppositional behaviors, defiant behaviors, and features suggesting increasing frustration. No new assessments were utilized to establish this diagnosis; rather it was predicated on his historical profile, information provided by his parents and their "identifying these aggressive behaviors in all domains of functioning in all areas including schools and public places." No such behaviors were ever observed by the physician either in his office or on a one-to-one basis (Tr. 313, 319-322).

82. Dr. Levinsohn acknowledged the various recommendations contained in his letter of April 2, 2003, with respect to the educational placement of the child and appropriate related services would represent the absolute "best case program" for the child (Tr. 342, Respondent's Exhibit 9).

83. Julie Peacock is an occupational therapist employed by the Parma City School District. She received her undergraduate degree from John Carroll University in 1989; thereafter she completed her master's degree in occupational therapy at Rush University in Chicago, Illinois in 1992. After graduation she was employed at MetroHealth Center in Cleveland, Ohio, where she was selected for certification in neurodevelopmental techniques for rehabilitation purposes. After holding various other positions in her field, she was hired by the Parma City School District approximately five years ago. She is certified as an occupational therapist by the state of Ohio. Ms. Peacock estimates she has about 30 credits accumulated in conjunction with maintenance of state licensure, with the bulk of them dealing with issues autistic children face (Tr. 290-293).

84. Ms. Peacock has neither met nor observed the child. She has reviewed the occupational therapy final summary prepared by the Achievement Centers, the therapist's notes and the Peabody Developmental Scales. In addition, approximately one to two weeks prior to the scheduled IEP meeting, Ms. Peacock conversed with the direct OT instructor at the Achievement Centers on two occasions for approximately 30-40 minutes total; the primary thrust of these discussions was the child's IEP goals and his progress (Tr. 294- 295, 304).

[19]85. Ms. Peacock was an IEP team member; she discussed the child with the parents; however she was not comfortable drafting IEP goals and objectives for a child she had not seen. Instead, she recommended the child be evaluated at the beginning of the school year; in this manner, the goals would be tailored to the current abilities of the child and would take into consideration any potential difficulties associated with a new school and foreign environment. Also, the parents expressed concerns that no sensory goals were incorporated in the child's prior IEP; it was Mr. Peacock's intention to identify specific sensory issues in order to create an appropriate goal. The evaluation was to be part of an overall functional behavior assessment and was to be completed by September 30, 2003 (Tr. 297-298).

86. The evaluation was to include a sensory inventory, assessment of fine motor skills, and assessment of visual perception needs utilizing the Visual Motor Integration test and the Motor Free Visual Perception Test (Tr. 299-301).

87. Although occupational therapy was designated as a special education service to be provided in the summary section of the last page of the IEP, neither the OT goals and objectives, nor the LRE for provision of services, nor the duration of occupational therapy services was set forth in the proposed 2003-2004 IEP (Tr. 304-305, Respondent's Exhibit K).

88. After the completion of the school-age MFE and prior to the June 2, 2003 IEP meeting, the Parma City School District selected two staff members to visit the Achievement Centers East and observe the child in the school setting. These individuals were Michelle Munici, a speech language pathologist, and Kim Tomco, a special education teacher with a self-contained classroom serving kindergarten through third grade multihandicapped students. The purpose of the visit was to determine whether the child would be an appropriate fit for educational placement within the Parma City School District; the observation took

place on May 21, 2003. Ms. Tomco and Ms. Munici were at the school for approximately 3.5 hours; the actual observation was for somewhat less a time frame. (Tr. 265-266, 477-478, 489).

89. Ms. Tomco and Ms. Munici arrived prior to the start of school. When the child arrived, Ms. Gerber introduced the teachers to him; and the child was able to say hello. The child engaged in conversation immediately; he told them about a computer game he played the night before (Tr. 267).

90. Ms. Munici is a graduate of Cleveland State University. She received an undergraduate degree in speech language pathology in 1989 and a master's degree in speech pathology in 1991. She has been employed a total of twelve years in her field, with the last four as a speech pathologist in a school setting (Tr. 264-264).

91. Ms. Munici spoke with the child's lead teacher as well as the speech therapist. They discussed the fact that the child engaged in temper tantrums, particularly when he was engaged in a nonpreferred task. Ignoring the behaviors had achieved some positive results. The teacher also indicated the child was able to generalize his academics. Both [20]individuals stated the child engaged in more appropriate behavior when he had more

appropriate peers. The speech therapist noted his speech had a quick rate of speed and could be difficult to understand at times. (Tr. 266, 267, Respondent's Exhibit S, 269).

92. The child socialized with other students in the class. He was able to follow the routines of the school. He interacted very well with adults and was able to express his needs to them. The child was attentive to the instruction and participated in circle time activities. The teacher indicated the child was having a "pretty good day" and expressed surprise that the child had not exhibited resistance to any activities (Tr. 268-270).

93. Based on her observations of the child, discussions with staff at the Achievement Centers, review of the final summary prepared by the Achievement Centers, Ms. Munici prepared the IEP the language/communication goals incorporated in the child's proposed 2003-2004 IEP. These goals were intended to continue his speech language development and to build on skills he had mastered at the Achievement Center. The goals addressed (1) use of language as a tool to interact appropriately and (2) improvement of the child's expressive language skills. There are three corollary objectives attached to each goal. (Tr. 271-273).

94. In the "Least Restrictive Environment" column, the proposed IEP indicated the child would receive speech language therapy "in a separate setting but learned skills will be practiced in the classroom". Ms. Munici identified her use of the word "classroom" to mean a carryover of his instruction into any naturalistic setting, including the special education classroom, the music room, the library, lunch, and recess (Tr. 273-274).

95. Direct services in a small group setting would be provided for 60 minutes per week, and work on speech goals would then be carried on throughout his entire day, just as it was at the Achievement Centers (Tr. 282).

96. Kimberly Tomco received her undergraduate degree from Cleveland State University in 2000. Her major was special education; she is employed as a moderate to intensive intervention specialist and is certified for grades pre-kindergarten to 12. At present, she is completing her master's of education at Baldwin-Wallace College. This is her fourth year as an employee of the Parma City School District (Tr. 477).

97. Ms. Tomco heads a cross-categorical classroom and has had three or more autistic students in her care each year (Tr. 477-478).

98. Ms. Tomco described her conversation with Jacqueline Gerber on the day of her visit to the Achievement Centers East to observe the child. Ms. Gerber stated the child requires high motivation. He was grade-level appropriate with respect to the academic skills needed for kindergarten. He was able to sort, match, knew some letters and numbers to 20. He could sequence pictures, order by size; he knew patterns, color words, and had recently been introduced to number words. He could generalize these skills. With respect to self-help tasks, the child was independent in cleaning up, brushing his teeth and [21]dressing in the bathroom. He did require help with fasteners (Tr. 479, Respondent's Exhibit S, 267-268).

99. Ms. Gerber indicated the child has a tendency to pick on the lower functioning kids because he understands what can set them off. As a result, she suggested a more appropriate placement for him might involve a classroom consisting of higher functioning kids (Tr. 479).

100. Throughout the day, the child transitioned without an issue. When the timer went off, he would check his schedule and move to the next activity. No behavioral tantrums were observed (Tr. 482).

101. Ms. Tomco observed the child at a TEACCH

independent work station. He was working on three activities -- a Letter A worksheet, stringing the letter A, and an accounting file folder. An adult was present who provided minimal verbal cues and the motivation of a sucker upon completion of all three activities. Ms. Tomco considered the physical structure of her classroom to be similar, with each area clearly visible and discernible as to its purpose. At work time, individual work systems are utilized to provide the students with the amount and sequencing of tasks, as well as the reward for completion. The children use visual picture schedules, and the staff provides visual cueing frequently throughout the day (Tr. 480-483).

102. Prior to leaving the Achievement Centers, Ms. Tomco and Ms. Gerber discussed which classroom at Pleasant Valley Elementary would be more appropriate for the child. It was determined Ms. d'Aliberti's classroom would be preferable, as the students in that room were verbal peers, social peers and more academic peers (Tr. 485).

103. Based on her knowledge of Pleasant Valley Elementary School, her observation of the child and review of the documents provided, Ms. Tomco stated the school would offer an appropriate educational placement for the child. Services are provided based on the

child's individualized needs. The classrooms are highly structured in centers. Visual cues are utilized. Behavior plans are individualized for each child, with regular assessment and modification as needed. Speech and occupational therapy are provided in small group settings and are addressed throughout the day across all settings. Adapted specials, physical education, music and art are tailored to the student's special needs (Tr. 485).

104. Ms. Julie d'Aliberti graduated in 1985 from Kent State University with a major in hearing impaired education; the following summer, she completed the course work necessary for a certificate in elementary education. In 1991, she received her master's degree in multihandicapped education from Cleveland State University. She has been employed as a teaching professional since 1986 and has held her current position in the Parma City School District since 1991.

105. Ms. d'Aliberti's classroom consists of eight students in the morning session and six students in the afternoon session, although in the afternoon, one student follows an [22]inclusion schedule which causes her to be out of the classroom for one to two hours each afternoon. Ms. d'Aliberti has two full-time classroom assistants (Tr. 525-526).

106. In the past Ms. d'Aliberti has sung lessons to a student who responded to the rhythmic tune and seemingly functioned better. She expressed a willingness to do this; otherwise, songs and music are primarily incorporated into circle time and end of day cleanup (Tr. 527-529).

107. Exposure of students to typical peers occurs in the cafeteria, at recess with typical peers outside and, when possible, use of classroom visits by older students, e.g., a fourth grader, is incorporated for play purposes. In addition, the class includes three children whose behavior is such that they can serve as peer models because they play like kindergartners and otherwise exhibit age-appropriate skills (Tr. 532-534).

108. The design of the room and structure of the activities in Ms. d'Aliberti's classroom are similar to that of the Achievement Centers. The classroom is divided into discrete areas including a Legos center, although the actual activity is diversified and not always Legos, a play area, a listening center, a book station, and two work centers. The play area has walls on three sides and a strip of blue tape on the fourth side -- a line of demarcation so toys do not come flying out. The listening center is in a cut out of the classroom, with no distractions. The book station has walls on three sides with a bookshelf. Children can

relax on a bean bag or in a chair and look at books. The work stations are segregated to avoid distractions; they have two walls and a table. Fifteen-minute one to one sessions are provided to each child at least twice in the morning and three times in the afternoon (Tr. 520-523).

109. Ms. Tomco and Ms. d'Aliberti collaborated to formulate proposed annuals goals and short-term objectives for the child's proposed 2003-2004 IEP. These goals and objectives were based on Ms. Tomco's observations and discussions with Achievement Centers personnel, a review of the child's school age MFE and various additional documents including the final progress summary prepared by Achievement Centers. The goals were based on recognized needs of the child; and Ms. d'Aliberti, who would have been the child's classroom teacher, had a concise understanding of the manner in which such objectives would be carried out in the classroom setting. These goals addressed (1) independent play with a peer during an interactive play activity. (2) following verbal direction the first time given and (3) transitioning to new activities throughout the school day. Goal 1 was accompanied by three short-term objectives. Goals 2 and 3 each had two appropriate short-term objectives. (Tr. 536-540, Respondent's Exhibit K).

110. Typical motivators utilized in the Ms. d'Aliberti's classroom are individualized to the child. These include verbal praise, pats on the back, engaging in a favorite play activity, 15 minutes on the computer, 5 minutes at the listening center, a red, yellow and green light system for behaviors, and prize boxes. The child's IEP specifies a proactive reinforcement program was to be established after one week of school, the intent being to create a master list of reinforcements to be used as motivators in different types of circumstances (Tr. 539-541).

[23]111. Speech language goals are worked on regularly in the classroom setting. Each short-term objective contained in the child's IEP can be addressed during the course of other activities. For example, responding to greetings by peers is an integral part of morning circle time when classmates discuss how they feel. One student who is very receptive to saying hello may speak to the child, and the teacher or her assistants would encourage him to respond (Tr. 541-543).

112. Similar carryover activities would also occur with respect to occupational therapy goals. Although occupational therapy typically occurs as a pullout to a separate room, it is not uncommon for the occupational

therapist to request the classroom teacher to work on particular goals or objectives. For example, if the child has sensory needs, the occupational therapist would demonstrate to the teacher the appropriate positive sensory input, and such input may be applied prior to a work session to calm the child down. Another example would involve fine motor goals such as cutting or letter writing that can be pursued in the classroom setting, after the teacher is provided with work samples and an understanding of how far to "push" the child to accomplish the goals (Tr. 542-543, 552-553).

113. Yvette Peck Newlin is currently employed in the Cleveland Heights-University Heights City School District. During the period 2000 to 2003, Dr. Newlin was special education supervisor in the Parma City School District. In this capacity, she was familiar with the child and his parents from the initial MFE and subsequent provision of services to him as a preschooler through the first year of his placement at Achievement Centers. She recalls attending the IEP meeting during the period March to May, 2002, at which time extended school year services were approved for the child. Although she remained with the school system through June, 2003, Dr. Newlin had no further contact with the child or his program due to time constraints. Dr.

Hudgins assumed responsibility for IEP meetings involving the child (Tr. 599-602, 613).

114. Dr. Newlin received a bachelor of science degree in physical education in 1972 at State University College at Rockport. She received her master's degree in adaptive physical education from Indiana University in 1973. In 1986, she completed all requirements for a doctorate in adaptive physical education and psychology, MRDD, from Ohio State University. She earned a principal's certification from Cleveland State University in the 1990's. Dr. Newlin has taught in numerous settings over the years, ranging from high school teacher, an instructor at the university level, a consultant-teacher for a school district, a teacher at a residential facility for deaf and blind children, various positions with the Cuyahoga County Board of Mental Retardation including county director of physical education, and special education supervisory positions at Bedford, Parma and Cleveland Heights-University Heights (Tr. 589-590).

115. As a part of her job responsibilities, Dr. Newlin visited [Private] School for an observation. The basis for this visit was not connected specifically to the child, but rather occurred as a part of observations of

three local facilities that provide services to students with autism. The [Private] visit took place in the summer months and lasted [24]approximately 60-90 minutes. Dr. Newlin was given a tour of the facilities in the company of a [Private] associate director; the observation provided a very basic overview of the school's setup and some of the services provided. Dr. Newlin described the physical structure of the school as unlike that of a typical elementary school; it is "set up almost like little office spaces". Each child had a schedule and moved through the spaces for work purposes; Instruction observed by Dr. Newlin was "either one on one or one on two at the maximum". Dr. Newlin did not view any supervised play or similar type of group activity (Tr. 602-605).

116. Based on her knowledge of the child and her general observation of [Private] School, Dr. Newlin stated she did not consider it an appropriate fit, as the child was "very social" and would benefit from observation of, and interaction with, typically developing peers. The child was capable of modeling skills and behaviors (Tr. 605)

117. Based on her knowledge of the child's skill level, which is somewhat dated, and her familiarity with the self-contained classrooms at Pleasant Valley Elementary School in the Parma City School District, Dr. Newlin

testified the child could "definitely" be served there (Tr. 606). This opinion was based on the structure of the classrooms, the expertise of the staff, the opportunities to be associated with typical peers, the opportunities for development of language, play and academic skills, and ultimately the possibility to mainstream into a regular kindergarten classroom, even if only on a very limited basis (Tr. 607).

118. Dr. Judy Hudgins is employed by the Parma City School District as Supervisor of Special Education. Her educational background consists of an undergraduate degree in speech language pathology from the University of Akron (1976), a master's degree in speech pathology from the University of Alabama (1977), and a doctorate in educational administration supervision and special education from the University of Akron (1990). Prior to enrolling in the doctoral program in 1987, Dr. Hudgins held positions as a speech pathologist at the Columbus State Institute in Ohio and the Lovett Independent School District in Texas. After receiving her Ph.D., she was employed at Kent State University for several years, initially as an interdisciplinary training coordinator for the Family, Child and Youth Center, servicing individuals in the master's programs for early childhood degrees and later in a program teaching the core course

work for individuals preparing to teach in the field of multiple and orthopedic handicaps. Since leaving the university, Dr. Hudgins has held the position of Supervisor of Special Education in the Cuyahoga Falls school system for five years and has been employed in the Parma City School District for four years (Tr. 659-662).

119. Dr. Hudgins conducted an observation of the child during his receipt of extended school year services at the Achievement Center on July 17, 2003. The purpose of her visit was to observe two students who could potentially be participating in the Parma extended school year program scheduled to begin August 4, 2003, and to make preparation for any needed transitions (Tr. 662-663).

[25]120. The visit consisted of approximately two hours in total, and roughly one-half of that time was spent in observation of the children. Both were in the same classroom. During this period, Dr. Hudgins observed the child at a reading station in a 1:1 setting, waiting until the snack station was available, at the snack station, and at outdoor recess or play time. The balance of the visit focused on discussions with staff members, a review of the work stations and various features that were unique to the Achievement Center's instructional setup that could be transferred

to the Parma school system for use with the child (Tr. 663-667).

121. Based on Dr. Hudgins' knowledge of the primary self-contained special education classrooms in Pleasant Valley during her tenure of service in the school system, her observation of the child, and any other familiarity she might have with him, such as serving as an IEP team member, Dr. Hudgins stated the child could be appropriately served in one of those classrooms. This opinion was based on her belief that the child's profile indicated a number of kindergarten readiness skills. While all of those skills are not perfect, he appears to be a child who could fare well in that program. He is verbal and ambulatory. He is able to initiate, ask questions and comment about things (Tr. 667-668).

122. At present, Susan Rueger serves as the principal of Pleasant Valley Elementary School, a position she has held for four years. She was assistant principal of the building for two years as well. Prior to that time, Ms. Rueger was employed as a classroom teacher in elementary buildings for 22 years. Ms. Rueger holds a bachelor's degree in elementary education from Heidelberg College in Tiffin, Ohio, and a master's degree in administration and

supervision from John Carroll University (Tr. 625-626).

123. Ms. Rueger describes the school as "diverse". In part, that diversity is attributable to the significant population of children with special needs that range from speech or occupational therapy requirements to needs that are more comprehensive and would require a multi-handicapped or cross-categorical classroom. There is also a gifted program (Tr. 626).

124. The building staff includes five inclusion teachers. There are a total of nine self-contained special education classrooms. These classrooms are cross-categorical in the sense that varying disabilities are accommodated within a single setting. There are students with developmental handicaps or orthopedic needs, some severe emotional disorders, although not significant ones, and a total of 21 autistic students in the building (Tr. 627).

125. Ms. Rueger is not familiar with the child who is the subject of this due process hearing, other than by name. She is aware that the school proposed placement of the child in Mrs. d'Aliberti's classroom which is a setting designed for children with a strong need for structure, routine and academic concentration. With the exception of the

resource room, it would be considered the highest functioning primary special education classroom. The students in the resource room either spend about 50 per cent of their day in an inclusive [26]environment or are moving toward inclusion at a somewhat faster pace than the children in Mrs. d'Aliberti's classroom (Tr. 629-630).

126. Pleasant Valley Elementary School has a service club consisting of 42 students in grades 3 through 6 who volunteer to visit special education classrooms as typical peers. In addition, there are numerous school activities that call for participation by all classrooms and students; these programs include parades, assemblies and special events that focus on holidays such as Veterans' Day or other appropriate and timely occasions. Finally, all special education students have opportunities for interaction with typically developing peers at lunchtime and during recess on the playground. In the case of special needs children who are capable of imitating behaviors, these opportunities to interact with typical peers can be beneficial (Tr. 631-633).

127. Ms. Rueger indicated the school curriculum includes adaptive special education, adaptive music, and adaptive art. Class sizes are six to seven students. If the child were

to attend the school, he would participate in each of these classes. Adaptive P.E. addresses the specific goals and objectives contained in each child's IEP in the context of a gym class, while adaptive music works on a variety of skills, including listening, sensory issues, hearing patterns, instrument playing and music appreciation. Parts of adaptive music are therapeutic in nature, but the class is not music therapy per se. Adaptive art incorporates a variety of activities such as cutting and gluing, working with various material types and textures, and some computer use, with each of these pursuits geared to addressing the goals and objectives set forth on a child's IEP. Art is 60 minutes per week, while music and physical education are twice a week for 35 minutes, or a total of 70 minutes each (Tr. 634-636, 641).

128. Beverly Miller has been employed by the Parma City School District since 1983. Her positions have involved instruction at the elementary school level. At present, she is assigned full-time at Pleasant Valley Elementary School where she teaches a typical music curriculum in the morning and adaptive music in the afternoon. Ms. Miller holds a bachelor's degree in music education from Baldwin Wallace College and a master's degree in supervision from the same institution. Ms. Miller is not a certified

music therapist; however, she utilizes a music therapy approach in her adaptive music classes. Adaptive music is taught to approximately 60 special needs students in groups varying in size from five to eight. Two aides provide classroom assistance. During the time Ms. Miller has conducted adaptive music classes, she has taught 50 to 60 autistic children (Tr. 492-494).

129. Beverly Miller described a typical adaptive music class. It begins with a hello song. Ms. Miller greets each child individually, establishes eye contact and elicits a response from the child. The hello song is followed by a mirror song; the mirror song is geared to recognition of oneself and one another. Next are two movement songs that change seasonally, e.g. at the time of the hearing, the children were walking to the Alfred Hitchcock theme song and dancing to the Monster Mash. Movement songs may involve the need to follow directions, based on changes in beat or melody. The next sequence addresses gross and fine motor skills, with the use of instrument playing, followed by [27]seasonal poetry and musical toys. The last ten minutes of the class are geared to relaxation. This segment typically includes singing "Our World is a Rainbow" as a disco ball turns and throws off rainbow-like colors, followed by "Music Time is Over". The songs utilized throughout

adaptive music are intended to target skills such as following directions, steady beat or rhythm recognition, acknowledgment of visual contact, socialization, proper greeting and closing (Tr. 497-504).

130. Kate Foley is employed by the Educational Service Center of Cuyahoga County as a special education supervisor for multiple districts. Educational Service Center is a partner with the Achievement Centers in the operation of two preschools for children with autism -- one in Cleveland and one in Lakewood. The goal of the partnership is to provide a preschool environment where children who have not been successful in their home district preschool setting with typically developing peers can be instructed utilizing appropriate methodologies and programs to allow them to develop sufficient skills to return to their home district and make a successful transition back into that setting (Tr. 351-352, 355).

131. Ms. Foley holds an undergraduate degree in special education and teaching certificates as elementary K-8 and developmentally handicapped. She also possesses a master's degree in administration, specifically supervision, that was awarded in 1996. At present, she anticipates receipt of her doctorate in administration in 2006 (Tr. 353).

132. Ms. Foley has more than ten years' experience as a classroom instructor, initially as a substitute teacher for the Cuyahoga County Board of Mental Retardation and thereafter as a special education teacher in the Olmsted Falls School District. She was involved in the development of a consortium between her district and the North Olmsted School District for the provision of services to autistic children. She has been employed at Educational Service Center for approximately five years and has multiple responsibilities. In addition, she has served on the Ohio Department of Education Alternate Assessment Committee for a number of years. Ms. Foley has been working with the Achievement Center through her job at ESC for three years (Tr. 353-354).

133. Ms. Foley estimated she had observed the child at the Achievement Centers on approximately 20 to 25 occasions or more during the two years he was a student there. During that period, the child has come up and talked to her; and she has interacted with him. She has seen him in his structured TEACCH session, viewed him with his classroom teacher, the occupational therapist, and speech therapist and has observed him on the playground. Ms. Foley also attended IEP meetings and progress review meetings for the child and discussed his progress with his teacher (Tr. 356-359).

134. The model for the Achievement Centers is not based on a single methodology; multiple methodologies are employed. It is intended to fit the program to the child rather than require the child to fit the program. In order to accomplish this, it is necessary to ascertain what techniques and settings provide the best results for a given student (Tr. 360).

[28]135. The child's attendance at the Achievement Centers provided some opportunities to interact with typical peers from a day care center located adjacent to the facility. Ms. Foley did not know the frequency of occurrence of interaction. Mary Beth Koss, manager of the education department at the Achievement Centers subsequently testified that, in the past few years, such opportunities were limited to interaction in the outdoor playground area once a day (Tr. 361, 369-370, 388-390).

136. Members of the Achievement Centers staff compile the end-of-year reports with respect to the child and participate in a team meeting to determine the propriety of transition activities back to the school district. Ms. Foley stated she was involved in these activities and was familiar with the information contained in the child's progress summaries. Based on her involvement with the child and the process and the information

contained in the progress summaries, Ms. Foley testified it would be appropriate to put the child into a special education classroom in a public school environment for his kindergarten year. The child had demonstrated progress throughout his attendance at the Achievement Centers and possessed the necessary skills to transition into a special education kindergarten classroom in a public school setting (Tr. 361-363).

137. There is no partnership between Educational Service Centers and [Private] School, nor does it appear that one exists between Achievement Centers and [Private] School. However, the parent represented the facilities were "sister schools" that were operated utilizing the same methodology. (Tr.364-365, 74-75).

138. Toni Giannone is a speech language pathologist who designs programs for children with autism. She holds an undergraduate degree from the University of Connecticut in speech language pathology and a master's degree in the same field from Western Michigan University. Since graduation in 1973, she has both attended and presented at numerous workshops and programs in her area of expertise. Approximately four years ago, Ms. Giannone was approached by Bellefaire Jewish

Community Board, the underlying support organization for [Private] School, and asked to assist in the development of a program for autistic children. Ms. Giannone stated she designed the program, developed the building, interviewed teachers, staff and parents, developed a case load, structured the curriculum and obtained certification of the program from the state of Ohio. The building that currently houses [Private] School was originally a dormitory (Tr. 678-679, 686).

139. The basic concept of [Private] School is twofold -- first to provide an individualized program because autistic children are very unique and have individualized needs and second to utilize a variety of staff in different disciplines to create a team approach in working with the students. Instruction is initiated utilizing a very small ratio -- typically one to one; and the ratio is gradually expanded, with the ultimate goal to provide the children with sufficient skills and tools to permit them to be mainstreamed back into their home school districts (Tr. 680-681).

140. Typically, a child moves from class to class in one-half to one-hour segments with periodic group interaction depending on the needs of the child. Such interaction could [29]occur in recess or play time, a

gross motor class or a social skills training class. Speech and language therapy are embedded throughout the program. Since the inception of the program, there have been approximately 60 students; of those, only five began instruction in a broader environment than one-on-one (Tr. 687-689).

141. Factors to consider in making a determination as to whether a child can be mainstreamed include: (a) academic levels, although these do not need to be exactly on grade level, but rather possessing the skills to lead to grade level, (b) need for support, (c) ability to interact with other children, (d) ability to modulate sensory information, i.e., possessing strategies to handle a larger grouping or school (Tr. 687).

142. Ms. Giannone identified the development of social skills as necessary in order for a child to be successful in mainstreaming. She defined social skills training as beginning with social stories, basic turn taking, conversational exchange, sharing, all the way up to more abstract reasoning, interacting with other children while maintaining a conversational exchange for two to three utterances (Tr. 684).

CONCLUSIONS OF LAW

A. The applicable procedural requirements of

the IDEA as set forth at 20 U.S.C. 1415 et seq. were satisfied after the filing of the parents' request for due process and throughout the preparation and conduct of the hearing.

B. The child is a "child with a disability" as that term is defined in 34 C.F.R. § 300.7(a). He has been determined to be autistic. Autism is defined at 34 C.F.R. § 300.7(c)(1)(i), as:

> ...a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evidenced before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences....

C. The Parma City School District is a "local educational agency" as that term is defined in 34 C.F.R. § 300.18.

D. As a child with autism, the child is entitled to a free appropriate public education, meaning special education and related

services that (a) are provided at public expense, under public supervision and direction, and without charge, (b) meet the standards of the state educational agency, including the requirements of this part, (c) include an appropriate preschool, elementary school, or secondary school education in the state involved, and (d) are provided in conformity with an IEP 20 U.S.C. § 1401(8).

[30]E. The Parma City School District offered the child an IEP for the 2003-2004 school year that provided special education and related services for six hours per day with the bulk of services provided in a special education kindergarten classroom at Pleasant Valley Elementary School, consisting of a total of six to eight children, a teacher and two aides. Inclusion with nondisabled peers was incorporated at recess lunch, school assemblies and programs. Parents alleged the program offered did not provide the child a FAPE and sought placement in a specialized autism program at the [Private] School. The party alleging the denial of a free appropriate public education or challenging the adequacy of an individualized education program bears the burden of proof Cordrey v. Euckert, 917 F.2d 1460, 1469 (6th Cir. 1990) *cert. denied* 499 U.S. 938 (1991). Petitioners failed to establish by a preponderance of the evidence that the program proposed by the school district did not offer the child a free

appropriate public education designed to provide educational benefit to the child.

F. The contents of the IEP document offered in association with the 2003-2004 school year are substantially consistent with the requirements of the IDEA 20 U.S.C. 1414(d) et seq; 34 C.F.R. § 300.347(a), with the exception of the section covering the provision of occupational therapy services to the child. The IEP does not include the frequency, duration and least restrictive environment for these services. However, given the current level of the child's fine and gross motor skills, the areas of need delineated in the Achievement Centers' final summary that related primarily to modifications designed to improve the child's environment, the minimal delay in provision of such data, i.e., less than 30 days, and other factors, as set forth in Law and Argument below, this deficit is not considered to be substantive.

G. The parent was provided an opportunity to equally participate as a team member in the IEP process. Such participation requires the other team members to afford the parent(s) an opportunity to share information and voice concerns regarding the development of the child's IEP. However, where consensus is not possible, the ultimate responsibility for the provision of FAPE to a student rests

with the school district 34 C.F.R. § 300, Appendix C, Question 9.

H. Independent opinions offered by outside providers and consultants such as Dr. Morris Levinsohn, the child's pediatric neurologist, are to be reviewed and considered by IEP team members together with all other relevant data, when creating an IEP for a child. It is not necessary that a school district "embrace" such opinions. G.D. v. Westmoreland School Dist., 930 F.2d 94, 947 (1st Cir. 1991).

I. Petitioners seek a program with intensive speech-language interventions, music therapy and one-on-one instruction throughout the course of the school day. Dr. Morris Levinsohn recommended the child be afforded an educational placement that incorporated these requirements and stated it would represent the absolute "best case program" for the child. Similarly, Ms. Gerber, the child's teacher at the Achievement Centers and an IEP team member who believed the child could be served in a special education classroom in the Parma City School District, qualified her statements by indicating that, as a mom, she understood wanting "the best" for your child. However, the IDEA does not require an ideal education or the best education available for a certain child Klein Indep. Sch.

Dist., 29 IDELR 670, 675 (Texas, 1998). As enunciated in Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), maximization of a student's potential is not required. Rather, the statute mandates a public school provide sufficient [31]specialized services so that the student benefits from his education. The IEP offered by the Parma City School District meets this standard.

J. While music therapy is recognized as an appropriate related service where the IEP team determines it to be necessary for the child to benefit from special education and to receive FAPE, the testimony offered at hearing by the child's lead teacher at the Achievement Centers demonstrates that, while music therapy may be beneficial to the child, it is not essential. Ms. Gerber represented she did not use music or sing as a part of her instruction of the child and he "still picked up his skills"; in fact, she described the child's greatest gains during his second year at the school to be in the area of pre-academic skills, i.e., the area of instruction for which she was primarily responsible Letter to Farbman, 34 IDELR 7 (OSEP, Apr. 5, 2000).

K. The parents stress the importance of the TEACCH methodology in achieving educational success with the child and seek its utilization in the child's educational

program. However, the evidence presented at hearing indicates the child responds to the structured nature and relatively isolated learning environment provided by the independent work stations that form a part of TEACCH. A comparable work center structure is in place in the special education classroom at the Pleasant Valley Elementary School. In addition, methodology disputes are typically left to the discretion of the school district so long as the chosen methodology provides FAPE Lachman v. Illinois State Bd. of Educ., 853 F.2d 290 (7th Cir. *cert. denied* 488 U.S. 925 (1988).

L. The parents allege the IEP proposed for the 2003-2004 school year provides inadequate amounts of one-on-one instruction. However, the parents have not demonstrated a specified need for these levels of service in order for the child to receive educational benefit. Although a child has made progress in a low student/teacher ratio setting, it does not automatically follow that he would be unable to make satisfactory progress in a class with a higher student/teacher ratio setting Bd. of Educ. of City Sch. Dist. of the City of N.Y., 34 IDELR 54 (N.Y. 2000). In addition, it is necessary to weigh the relative benefits of intensive interventions versus opportunities to play with other children, use developing language skills with others, including nondisabled peers, and to

generalize skills and concepts learned in one-on-one and small group environments LaMesa-Spring Valley Sch. Dist., 30 IDELR 191 (CA. 1999).

M. The parents allege the IEP proposed for the 2003-2004 school year provides inadequate amounts of speech language therapy. Previously, the child had received a minimum of 90 minutes per week; this amount was set at 60 minutes per week, with at least one small group pullout, in the proposed IEP. Both programs represent generalization of speech language therapy and goals to be embedded into the classroom structure. It is uncontroverted the child continues to require speech language therapy; however, it has not been demonstrated that a quantifiable amount of such therapy is required. As stated in Conclusion of Law L above, it does not automatically follow that progress at a specified frequency/duration of services and LRE excludes the possibility of satisfactory progress at a varied or reduced level Bd. of Educ. of City Sch. Dist. of the City of N.Y., 39 IDELR 54 (N.Y. 2000).

N. The IDEA and its implementing regulations, and specifically 34 C.F.R. § 300.347 require the school district to provide special education and related services designed to provide an educational benefit to the child in an inclusionary environment, i.e., with

disabled and [32]nondisabled students, to the maximum extent appropriate. Based on the testimony presented at hearing as to the child's progress, current abilities, and special needs, as well as the continuum of placement options set forth in the IDEA at 20 U.S.C. § 1412(a)(5)(A) and 34 C.F.R.§ 300.551, the appropriate least restrictive environment for the child is within a special class, such as the special education kindergarten classroom at Pleasant Valley Elementary School. This is the placement offered to the child in the proposed 2003-2004 IEP.

DECISION

In light of the foregoing Findings of Fact and Conclusions of Law, it is hereby decided that:

The relief sought by the petitioners is denied. The parents have failed to establish by a preponderance of the evidence that the IEP recommended for the 2003-2004 school year did not provide a FAPE to the child. The individualized education program offered takes into consideration the results of the school-age multifactored evaluation and other evaluations, appropriately identifies the child's needs, establishes annual goals and short-term objectives which are intended to address the child's educational deficits, and establishes the appropriate least restrictive environment for the provision of special education and related services. The educational program

offered is reasonably calculated to provide educational benefit to the child.

As a result of the determination that the IEP recommended for the 2003-2004 school year offers an appropriate educational program and placement to the child, the petitioners are not entitled to reimbursement for tuition and transportation costs in association with their private placement of the child at the [Private] School for the 2003-2004 school year.

LAW AND ARGUMENT

As previously discussed, the issues presented for determination in the due process setting were set forth by the Petitioners generally as follows:

> 1) The placement proposed in the child's 2003-2004 IEP is not appropriate. Placement in a specialized autistic program such as the Achievement Centers proved very successful for the child, and his education should be continued in a comparable setting such as the [Private] School. Although the IDEA contains strongly preferential language for mainstreaming, inclusion is not necessary when the regular classroom provided an unsatisfactory education. See, e.g., Beth B. v. Van Clay, 282 F.3d 493 (7th Cir.) 2002.

2) Petitioners consider the school district's proposed change of placement from a specialized autistic program environment to a special education classroom at Pleasant Valley Elementary School in the Parma City School District to be an unauthorized change of placement. The parents do not approve and have filed for due process as their right.

[33]3) Where a more restrictive program has been shown to be successful, the burden of justifying a new IEP, including placement, shifts to the school district Bd. of Educ. of the Couny of Kanawha v. Michael M., 95 F. Supp 2d 600 (S.D. W. Va.) 2000. Given the child's success at the Achievement Centers and currently at [Private] School, coupled with a previous negative history of the child in the Parma City School District, his current placement at [Private] School is appropriate and in the best interests of the child.

Respondent asserts the sole issue to be decided is the least restrictive environment for the child during the 2003-2004 school year. It is the school district's position that the appropriate LRE was offered in the child's proposed IEP for that time frame, i.e., a cross-categorical special education kindergarten classroom at Pleasant

Valley Elementary School in the Parma City School District.

These issues will be discussed in the following sequence:

1) Burden of Proof

2) Assessment of Program Offered by Proposed 2003-2004 IEP, with particular consideration given to deficiencies alleged by parents,

3) Impact of Expert Medical Testimony provided by Dr. Morris Levinson,

4) Petitioners' Entitlement to Relief Requested

Each of the above-delineated issues must be assessed in light of existing federal and state laws enacted for the specific purpose of insuring the provision of education and related services to a special needs child. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq. and its implementing regulations, 34 C.F.R. § 300 et seq. provide such governance at the federal level.

In enacting IDEA, Congress stated at 20 U.S.C. § 1400(c):

> "It is the purpose of this Chapter to assure that all children with disabilities have available to them. . . . a free, appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist states and localities to provide for the education of all children with disabilities and to assess and assure the effectiveness of efforts to educate children with disabilities."

This broad-ranging purpose was similarly enunciated by the Ohio legislature in its passage of Ohio Revised Code Chapter 3323 titled "Education of Handicapped Children".

[34]The concept of a free appropriate public education or a "FAPE" as the requisite standard to be met in the education of the disabled, is a concept the judiciary has wrestled with, reviewed, and refined in the more than 25 years that have elapsed since the passage of the predecessor statute to IDEA, i.e., the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1400 et seq., in 1977.

The seminal case in this on-going judicial effort to provide a clear definition of FAPE is Hendrick Hudson Cent. School Distr. Bd. Of Edn.

v. Rowley, (1982) 485 U.S. 176. After careful consideration of the language of the Act and its legislative history, the Supreme Court held that a state satisfies the requirements of provision of a "free appropriate public education" when it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction". Id. at 188-189. Further, the court established a two- pronged test to evaluate state compliance with the mandates of IDEA:

1) Has the State complied with the procedures set forth in the Act?

2) Is the individualized education program developed through the Act's procedures, reasonably calculated to enable the child to receive educational benefits?

Procedural violations are violations which result in "loss of educational opportunity" or which seriously infringe on the parents' opportunity to participate in the IEP formulation process" W.G. v. Board of Trustees of Target Range School Dist. No. 23, 960 F.2d 1479, 1484 (9th Cir., 1992). As noted above, however, such violations do not automatically require a finding of denial of FAPE. Rather, the two-pronged test of Rowley is the standard for determination.

Substantive violations require a separate analysis that is predicated on the level of instruction and services provided to the student with disabilities. The Supreme Court concluded that the standard for determination of whether a local education agency's provision of services substantively provided a FAPE involves an assessment of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services will provide educational benefit to the student, and (3) whether the services conformed to the IEP. Rowley, 458 U.S. 176 (1982).

The court, in Rowley, also posited that while a state is required to provide a "basic floor of opportunity" to disabled students, it is not required to "maximize the potential of handicapped students" Rowley, 458 U.S. at 189. Rather, the purpose of IDEA was to open the door of education to disabled children. Since the Rowley decision, lower courts have employed a broad range of phrases to characterize the specific level of educational benefit required to be "appropriate". These include: "more than de minimis" Doe, etc. v. Smith, 879 F.2d 1340, at [35]1341 (6th Cir.1989); "the educational equivalent of a serviceable Chevrolet" Doe v. Bd. of Educ. of Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993); "more than trivial" Creamans v. Fairland Local School Dist., 633 N.E.2d 570 (4 Dist. 1993). Given the lack of specificity provided by such phraseology, it appears clear the issue of provision of educational benefit

should be judged on an individual basis, in terms of the (1) student's disabling condition; (2) education needs; and (3) program actually offered. Independent School District No. 318, 24 IDELR 1096 (SEA, MN 1996) .

It is against the backdrop of these statutes and case law precedent that the issues involving the provision of FAPE to the child must be assessed.

1) Burden of Proof

Respondent's post-hearing brief correctly articulates the position of the Sixth Circuit visa- vis burden of proof in due process hearings. The party alleging the denial of a free appropriate public education or challenging the adequacy of an individualized education program bears the burden of proof. Cordrey v. Euckert, 917 F.2d 1460, 1469 (6th Cir. 1990) *cert. denied,* 499 U.S. 938 (1991). The burden of proof to be applied is a preponderance of the evidence. If the party claiming denial of a FAPE or challenging the adequacy of the IEP fails to meet that burden, the party is not entitled to relief. Doe v. Bd. of Educ. of Tullahoma City Schools, 9 F.3d 455, 360- 461 (6th Cir. 1993) *cert. denied,* 511 U.S. 1108 (1994); Doe v. Defendant I, 898 F.2d, 1186 1191 (6th Cir. 1990).

In the case at bar, the parent affixed her name to the signature page of the proposed 2003-2004 IEP of the child, and marked in the top margin "06/02/03 Participation Only". The parent

marked the consent box at "I give consent to initiate special education and related services specified in this IEP except for LRE" and placed her name on the signature line. Thereafter, as required, the school district completed Form PS-401 titled "Written Notice to Parents" that indicated:

> "Parent disagreed with offer of 6 hour classroom in public school setting with self-contained special education instruction for kindergarten. Parent wants specialized 'autistic' program out of district."

Form PS-401 was dated June 2, 2003, and signed by Judith Hudgins, Director of Special Education for the School District.

The parents filed a request for due process dated June 2, 2003. The request was time stamped by the school district as received on June 5, 2003. On this basis, it is the petitioners who bear the burden of proof.

Petitioners reference Lascari v. Bd. of Educ., 560 A.2d 1180, 116 N.J. 30 (N.J. 1989) in support of their position that where there exists a history of achievement in another setting, the school district then has the burden to justify the proposed IEP. However, Lascari is not binding precedent in this jurisdiction. As stated in the 1999 case of Dong v. Bd. of Educ. of the Rochester Comm.

Schools, 31 IDELR 157 (6th Cir. 1999), despite numerous efforts to distinguish the court's established line of authority with respect to burden of proof, the Sixth Circuit continues to "adhere to the cases holding that the party challenging the terms of an IEP should bear the burden of proving that the placement was not appropriate (citations omitted)".

In a similar vein, Petitioners contend the placement of the child in a special education kindergarten classroom within the Parma City School District constitutes an unauthorized change of placement. The Ohio Model Policies and Procedures for the Education of Children with Disabilities (2000), at Section 6 IEP/LRE, pages 56-57, addresses the sequencing of children from preschool special education to school-age activities as a "transition process" that requires the convening of an IEP meeting "to determine appropriate school-age special education and related services". The transition process is intended to occur at or before the student reaches compulsory school age A transition of this nature cannot properly be considered a "change of placement" that could trigger a shift in the burden of proof.

2) **Assessment of Program Offered by Proposed 2003-2004 IEP**

The IDEA defines "FAPE" as special education and related services that (A) have been

provided at public expense, under public supervision and direction and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary or secondary school education in the state involved; and (D) are provided in conformity with an IEP 20 U.S.C. § 1401(8). Special education and related services are identified as those services that will be provided for a child: (1) to advance appropriately toward attaining the annual goals; (2) to be involved and progress in the general curriculum; and (3) to be educated and participate with other children with disabilities and nondisabled children in the general curriculum. 34 C.F.R. § 300.347.

[37]Thus, the IEP, as the necessary cornerstone to the provision of FAPE and the document that sets forth the special education and related services offered, comprises a critical factor in the assessment of the program proposed by the Parma City School District. The record contains relatively sparse information regarding the discussions among the team members at the IEP meeting, thus the extent to which the sequential steps in the IEP process as set forth in Ohio Model Policies and Procedures (2000), was carried out is not clear. However, the IEP as a written statement developed, reviewed and revised in accordance with the requirements of 20 USC 1414(d) speaks for itself. The 2003-2004 IEP represents an offer of services to the child. Once executed by the participants and consented to by the parent, the IEP is a legally binding commitment of resources,

and case law precedent requires that all of a child's unique needs arising from his or her disability must be addressed, not simply academic needs Abrahamson v. Hershman, 701 F2d 223 (1 Cir., 1983).

The IEP consists of a detailed written statement arrived at by a multi-disciplinary team, summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive. The IEP must include, among other things, a statement of the child's current level of educational performance, annuals goals for the child, specific educational services to be provided, and the extent to which the child will participate in regular educational programs, pursuant to 34 C.F.R. § 300.346. The IDEA imposes numerous procedural safeguards to ensure proper development of the IEP and to protect the rights of parents and guardians to challenge the IEP. 20 U.S.C. §§ 1401(19), 1414(a)(5); Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3rd Cir. 1993).

A review of the proposed 2003-2004 IEP offered by the Parma City School District reflects compliance with the prerequisites set forth above, with two primary exceptions: (1) The IEP failed to address "Step 1 "Discuss Vision: Future Planning". Typically, this information is provided by the parent. However, inasmuch as the Ohio Model Policies and Procedures (2002) at Section 6 IEP/LRE, p. 20, specifies that "Vision is not an

area subject to due process", it is reasonable to conclude that the absence of this information does not constitute a meaningful violation of the IDEA. (2) Although occupational therapy was identified as a related service, the IEP failed to specify the frequency, duration and LRE of these services. This violation is considered to be technical rather than substantive in nature for reasons more fully addressed at subsection (D) below.

[38]The annual goals set forth are measurable and are designed to meet the child's needs that result from his disability and to enable the child to progress in the regular curriculum and to receive a free appropriate public education. Further, each goal was accompanied by short-term objectives that included measurable standards capable of being met within the time frame of the IEP. These objectives were sufficiently specific, with the exception of Objective ST2c, which requires the child to "answer 'WH' questions appropriately"; preferred practice would dictate the use of a measurable percentage of numerical goal per number of opportunities, rather than the more subject "appropriately". The goals, objectives and services contained in the child's proposed IEP were based on his progress during the 2002-2003 school year; criteria considered in the IEP development included observation of the child by school district staff, in-person and telephonic communication with Achievement Centers personnel and therapists who worked with the child, review of the child's school-age multifactored evaluation and his various

Achievement Center's progress reports, and input from team participants. Overall, the goals and objectives crafted in association with this IEP are reasonably related to the child's educational needs.

While the document is not overly lengthy and does not address academics per se, these are not flaws. A child's IEP is not intended to function as a lesson plan. In fact, federal regulations specifically provide that the IEP is not intended to be a detailed instructional plan, but rather is intended to "(1) set the general direction to be taken by those who will implement the IEP and (2) serve as the basis for developing a detailed instructional plan for the child". As indicated at Question 56 of Appendix C, the federal IEP requirements can usually be met in a one to three page form. See 34 CFR Part 300, App. C.

During the course of hearing, the petitioners presented several objections to the proposed 2003-2004 IEP. Each of these is considered below:

A) Placement. As previously noted, the parent executed the box on the proposed 2003- 2004 IEP consenting to the provision of services except as to the LRE. It is the petitioners' contention that the child's unique needs require placement in a specialized autism program with intensive interventions and supports. On the "Parent Attachment to IEP", a class ratio of "not more than eight students, with one to one 50 per cent of his day" is suggested (School District Exhibit K, p.

147). However, the mother's testimony at hearing in this regard was: "He needed a small ratio. We were thinking one to two children. This [referring to [Private]] is zero children. [39]That is what he ended up with" (Tr. 51). Further, the relief requested in association with this administrative hearing involves maintenance of the child's current private placement at the [Private] School and reimbursement for tuition and transportation expenses incurred in such placement.

Testimony offered regarding placement reveals the parent expressed interest in investigating alternative programs for her child for the 2003-2004 school year, and had, in fact, discussed this option with Dr. Hudgins around February, 2003, prior to the completion of the school-age MFE. In March, 2003, the parent apparently indicated to the child's private speech therapist her desire that the child not attend Parma school, but instead continue his education at [Private] School. At the time the ETR was discussed and executed in May, 2003, there was also brief discussion of the possibility the school district would create a specialized program for autistic children; however, the implementation of the program was on hold due to a new superintendent coming on board and questions regarding availability of funding. In the interim, the parent was identifying other program options and had contacted [Private] School for literature.

The mother testified the "Parent Attachment to IEP" included in detail everything the parents considered essential to the child's 2003-2004 IEP; she was given an opportunity to discuss these requirements at the June 2, 2003, IEP meeting. The parent prepared this document as a form of "prior written notice" to the school district; she presented it to Dr. Hudgins, the Director of Special Education and an IEP team participant, and requested Dr. Hudgins agree or disagree. Mother stated Dr. Hudgins responded "I'm not going to sign it". Mother then concluded that the team participants were not going to concur with respect to the child's program. She testified: "I just felt we were never going to agree. We just could not agree. We couldn't agree on how much he needed, what he needed, why he needed it ".

The parent stands on equal footing with other members of the IEP team, and his or her information and concerns about the child are important considerations in the development of an IEP. The goal of the IEP team is to achieve consensus on the appropriate educational program for the child. Where the team fails to reach consensus, however, it is the school district that is ultimately responsible for ensuring the child has an IEP that constitutes FAPE. (34 CFR Part 300, Appendix C, Question 9 (1998)", as cited in Better IEPs by Bateman & Linden, (3rd Ed. 1998).

[40]In this respect, the parents' focus centered on development of a program with

services, supports and interventions to address each developmental delay, physical or emotional shortcoming the parent identified in the child in an effort to maximize the educational benefit accruing to the child; this statement is supported by testimony elicited at hearing, but one need look no further than the single-spaced 1.5 page document identified as "Parent Addendum to IEP" to reach this conclusion. Is it wrong for parents to want the best for their child? Of course not. It is entirely appropriate for parents to focus on the needs of their child. However, the obligations of the school district extend to a much broader population. With respect to a special needs child, the school district is obligated to provide special education and related services as set forth at 30 C.F.R. § 300.347. This obligation includes establishment of services designed to provide an educational benefit to the child in an inclusionary environment, i.e., with disabled and nondisabled students, to the maximum extent appropriate.

The IDEA placement options, from least restrictive to most restrictive, are (1) regular classes (with provision for supplementary services in conjunction with regular class environment; (2) special classes; (3) special schools; (4) home instruction; (5) instruction in hospitals/ institutions, and (6) other appropriate environments. 20 U.S.C. § 1412(a)(5)(A); 34 C..F.R. § 300.551.

Based on observation of the child at the Achievement Centers by Parma City School

District personnel, discussions with Achievement Centers staff members, review of documents and progress reports provided by the Achievement Centers, information contained in the child's school-age MFE and discussion among the participants at the meeting, the IEP team members, with the exception of the parent, concluded the child's least restrictive environment for the 2003- 2004 school year would consist of a special education kindergarten classroom at Pleasant Valley Elementary School. Specifically, the team concluded the child had made sufficient progress during his two-year stay at the Achievement Centers to possess the strategies and skills necessary to perform in a special education classroom consisting of six to eight children of varying ages, skills and handicaps. This placement would include lunch, recess, universal school activities such as assemblies, and peer mentoring or reverse mainstreaming opportunities with nondisabled children. Jacqueline Gerber, the child's teacher at the Achievement Centers, stated he would benefit from a school environment with more typical peers, provided the appropriate supports were in place.

[41]The parent, on the other hand, is elated the child, who now attends [Private] School, is effectively being educated in a one-to-one environment that incorporates minimal contact with other children with disabilities and no contact with nondisabled students. Thus, the parent wishes to maintain the child's placement on the continuum

of alternative placements described in 34 CFR § 300.551(b)(1) at a special school, which is one step further along the continuum, i.e., more restrictive, than the IEP team's recommendation of special class. Petitioners acknowledge the IDEA contains "strong preferential language for mainstreaming"; however, they seek to circumvent the inclusionary preference incorporated by federal lawmakers by (1) requesting the child's education be continued in a comparable setting to that of the Achievement Centers, and (2) representing that inclusion is not necessary "when the regular classroom provided an unsatisfactory education".

With respect to item (1), it is not necessary to address the issue of whether [Private] School provides a comparable setting to the Achievement Centers. It is sufficient to look to 34 CFR § 300.552(b), which mandates a child's placement be determined at least annually. Further, such placement is to be based on the child's IEP and is to be as close as possible to the child's home. Clearly, the requirement of an annual determination recognizes that a child's needs may change. Indeed, the desire to achieve greater inclusion when possible is implicit within the context of the IDEA and its implementing regulations. With respect to the 2003-2004 school year, the IEP team participants, with the exception of the parent, perceived the child could derive educational benefit from the provision of special education and related services required by the child's IEP in a special education classroom at Pleasant Valley Elementary

School within the child's home school district. The testimony demonstrates the child possesses the appropriate skills to be considered "kindergarten ready".

In similar vein, petitioners' reliance on Beth B. v. Van Clay is misplaced. The reference to the "regular classroom providing an unsatisfactory education" presumably alludes to the child's placement at age 3 in a half-day preschool program within the Parma City School District. Since that time, the school district has funded the child's education at the Achievement Centers for a two-year period, including extended school year services. During that time frame, the child has made great strides toward the Center's enunciated goal of providing instruction to students, who had not been successful in a preschool setting with typically developing peers sufficient, to allow the students to develop the necessary skills to make a successful transition back to their [42]home school setting. In addition, the holding in the Beth B. case merely requires a determination of least restrictive environment for a child to be based upon the setting in which the child receives educational benefit.

The 2003-2004 IEP identifies LRE as a special education classroom and Needed Services as six hours of special education services daily.[1]

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[1] It should be noted the mother testified the proposed IEP called for one-half day in a special education classroom and one-half day in a regular

Extensive testimony was provided at hearing as to the structure of the special education classroom taught by Mrs. d'Aliberti at Pleasant Valley Elementary School. Mrs. d'Aliberti's classroom was chosen due to the generally higher level of functioning of the children in that setting, in deference to an observation made by Ms. Gerber, the child's lead teacher at the Achievement Centers, that he tended to pick on lower functioning children. The testimony accentuated the similarities between many of the daily routines of the classroom when compared with the child's prior multi-year experience at the Achievement Centers. These similarities were most noticeable in the usage of a morning routine, circle time, hello and good-bye songs, rotation through clearly-delineated activity centers in the classroom, including one-on-one instructional time, play center and book station. Visual picture schedules and prompts were incorporated into the child's IEP to facilitate transitions. Variable motivators and a proactive reinforcement program were addressed. Lunch, recess and assemblies at Pleasant Valley Elementary School would provide opportunities for interaction with nondisabled students. Differences were most noticeable in staff to student ratio, as Mrs. d'Aliberti's class included eight students in the morning and six in the afternoon; and she was supported by two aides. The Achievement Centers' staff-to-student ratios were smaller, as testimony

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classroom. The document states otherwise, and no other IEP team member corroborated this testimony.

indicated class size to be six, with four adults typically in the room for the full day. It is important to note, however, that instructional, i.e., academic, activities at the work stations in the special education classroom were conducted on a one-to-one basis in both environments.

B) Inadequate Amount of One-to-One Instruction. Plainly, the issue of one-to-one instruction overlaps with the concept of placement. To an extent, therefore, this parental objection has been discussed above. The argument vis-à-vis inadequacy in the amount of 1:1 time provided for direct instruction of the child also roughly parallels the dispute involving the amount of speech language therapy required to provide the child with educational benefit as discussed at subsection (C) below. Again, there is no evidence that the child needs a set amount [43]of one-on-one instructional time in order to receive a free appropriate public education. While it is in fact a truism that any child would receive educational benefit from significant amounts of one-to-one instruction, the IDEA does not require an ideal education or the best education available for a certain child. Klein Indep. Sch. Dist., 29 IDELR 670, 675 (Texas, 1998). Rather, the standard first enunciated in Bd. of Education v. Rowley, 458 U.S. 176 (1982) remains the touchstone:

> The IDEA does not require that a school either maximize a student's potential or provide the best possible education at

> public expense. The statute requires that a public school provide sufficient specialized services so that the student benefits from his education.... The goal of IDEA is more to open the door of public education to handicapped children on appropriate terms than to guarantee a particular level of education once inside. The main thrust...is to provide equal access to education, and no particular educational outcome is guaranteed by the IDEA. Gill v. Columbia 93 Sch. Dist., 31 IDELR 29 (W.D. Mo. 1999) citing Rowley.

Amy Lumadue, the child's mental health therapist from Beech Brook who currently works with the child in a small group setting, noted the child tended to lose focus as additional individuals were introduced into his environment. On cross-examination, however, she stressed the importance of development of socialization skills in very basic terms: "...much of life is not a one on one setting; it's a group setting such as this...; classrooms are group settings, meetings, working at a job; life skills typically occur with a lot of people around you." (Tr. 255).

The petitioners' belief that the child requires more intensive one-on-one instruction than provided in the 2003-2004 IEP does not obligate the school district to comply absent evidence of a specified need. In Dong v. Bd. of Educ. of the Rochester

Comty. Schools, 31 IDELR 157 (6th Cir. 1999), the Sixth Circuit upheld a school district's decision to provide 27.5 hours per week of TEACCH-based educational and related services rather than the 40 hour per week program of discrete trial therapy with more one-on-one attention sought by the parents. Because the case arose in Michigan, the applicable standard involved development of an IEP designed to maximize the potential of the child. The SHRO determined both programs would provide the child with FAPE designed to maximize her potential; however, the 27.5 hour program would do so in the least restrictive environment, as it also incorporated small group instruction, mainstreaming and reverse mainstreaming, and opportunities for the child to learn generalization [44]of language and spontaneous communication, independence, and social interaction. The district court held that, taking into account the IDEA's goal of providing services in the LRE, the school district's program was in fact better designed to maximize the child's potential.

The court also noted that the school staff members "were fully qualified to determine if a group or one-on-one setting would be best" and they were not required to accept the recommendation of the parents' expert. Id. at 558.

A similar result was reached in Gill v. Columbia 93 Sch. Dist., 31 IDELR 29 (W.D. Mo. 1999) where a district court found that a school district's proposed IEP, which included 35 hours

per week of instruction in a special education classroom and eight to nine hours of one-on-one DTT provided a FAPE. The parents challenged the IEP and requested 35 hours per week of exclusive one-on-one DTT instruction. While the court determined the parents had shown that the child responded well to one-on-one DTT, that alone was not sufficient. The parents had failed to demonstrate that the school district's proposed IEP was not reasonably calculated to confer an educational benefit to the student. The court questioned the viability of a program that emphasized one-on-one instruction to the detriment of skill development over a broad spectrum of areas; equally critical to the court's decision was the fact that evidence of the child's academic progress and ability to function in the classroom existed. Id. at 129-130. See also La Mesa- Spring Valley Sch. Dist., 30 IDELR 191 (CA. 1999), where a hearing officer ruled in favor of a school district's proposed preschool placement that offered a combination of in-home DTT and placement in a preschool day class that provided opportunities for interaction with nondisabled peers. The parents sought placement in an intensive 35-40 hour in-home DTT program based on their expert's opinion that the child required a one-to-one distraction free environment to learn. Id. at 198. Although evidence existed that the student learned in a one-to-one environment, the hearing officer held the school district's proposed IEP to be appropriate because it offered both one-to-one and group instruction giving the student "the opportunity to practice his

language skills, develop social skills or generalize all of the skills". Id. at 197. Moreover, participation in a classroom would be a step toward the ultimate goal of integrating the child in school and other activities with regular education peers to the maximum extent possible.

The school district's proposed placement of the child for the 2003-2004 school year involves a special education classroom consisting of six to eight students with a teacher and two aides. One-to-one and small group instruction would be provided throughout the day; in [45]addition, the child would be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments.

The child has demonstrated the ability to succeed in a center-based classroom at the Achievement Centers, where roughly one half of his day was one-on-one instruction. He has also demonstrated the ability to progress when learning in small groups; witness the testimony of Ms. Munici regarding her observation of the child, the testimony of his music therapist, Ms. Alspach who termed him a "peer model" in her music therapy group, and the acknowledgment of Ms. Mandell of March School that he was "doing well" during his small group instruction period. In light of these factors, it is clear the placement of the child in a special education classroom at Pleasant Valley Elementary School is not only appropriate as the

least restrictive environment, but is clearly preferable to the parents' choice of [Private] School where the child is instructed in a one-on-one environment for the greater part of the day. This preference provides the child with the breadth of educational opportunities relating to socialization and generalization of skills contemplated by the IDEA and the body of case law that has evolved since its introduction into law.

Finally, no evidence was presented that the child requires a quantifiable amount of one- on-one instruction to progress educationally. As stated above, the child would benefit from opportunities to play with other children, use his developing language skills with others, including nondisabled peers, and to generalize the skills and concepts learned in one-on-one and small group environments. Most importantly, participation in a classroom moves the child one step closer to the ultimate goal of participation with regular education peers in school and other activities to the maximum extent possible.

C) Inadequate Frequency/Duration of Speech Language Therapy. The amount of speech therapy also concerned the parent, as the child received a minimum of 90 minutes of direct services per week at Achievement Centers, while the 2003-2004 IEP called for 60 minutes per week with at least one small group pullout. The recommendation of 60 minutes per week of speech language therapy was made by Ms. Munici, a speech language therapist in

the Parma school district, based on her observation of the child at the Achievement Centers, and her discussions with Achievement Centers' staff, including Ms. Gerber, her assistants and the child's speech language pathologist. Further, Ms. Munici considered the 60 minutes per week to be appropriate because speech and communication concepts are embedded in the Pleasant Valley [46]program. This observation was confirmed by Mrs. d'Aliberti who indicated the practice of learned skills in the classroom setting was a common occurrence and was carried out based on regular communication with the therapist.

The Parent Attachment to IEP noted the child has improved his communication skills; however, the parents identify the following speech-language deficits:

> "speech is at 3-4 word utterances... anxious with new directions or unfamiliar activity... needs daily constant prompts to slow speech, quiet the volume and will require repeating examples to feel comfortable... will greet by name and at times confuses the names.... cannot easily express himself verbally when upset ... needs to be prompted to use words...."

Both Ms. MacGuire, the child's speech therapist from University Hospitals and Mary Beth Koss, manager of the education department at the Achievement Centers, addressed the significant

gains the child had made in the area of language communication over the past two years; both also stated the child still faces challenges in the development of receptive and expressive language.

In light of the testimony presented, it is uncontroverted the child requires speech language therapy. However, no evidence was presented that the child requires a minimum of 90 minutes of speech language therapy per week in order to receive an educational benefit. Further, one cannot surmise that because the child made progress at the Achievement Centers while receiving 90 minutes or more of speech language therapy per week, a decrease in the amount of weekly speech language therapy would necessarily cause a decline or cessation in the progress achieved. See, e.g., Bd. of Educ. of City Sch. Dist. Of the City of N.Y., 34 IDELR 54 (N.Y. 2000) where the court recognized that although a student had made progress in a low student/teacher ratio setting, "it does not follow that she would be unable to make satisfactory progress in a class with a 15-1 ratio" as proposed by the school district.

D) Lack of Specificity regarding Occupational Therapy Services. Although occupational therapy is designated as a special education service to be provided to the student, as delineated in the summary section of the last page of the 2003-2004 IEP, the IEP does not contain annual goals or short-term objectives to be addressed. Instead, the document notes under

"Needed Services" (School District Exhibit K, p. 149) the following "OT/Sensory (as part of FBA) assessment to be completed by September 30, 2003)". In addition, the least restrictive [47]environment in which services are to be provided is not enunciated, and the duration of services is not noted.

The present levels of performance in this area are contained on an addendum to the IEP that summarizes the child's strengths and weaknesses in the areas of fine and gross motor skills. Based on the occupational therapy final summary from the Achievement Centers prepared by the Maria C. Llerena, OT/L, and dated May 6, 2003, the child made significant progress while attending the Achievement Centers (School District Exhibit N, p. 191). The reference to the child's progress is corroborated by the testimony of other witnesses; see, for example, Ms. Beeler's (Parma school psychologist) representation that the child's scores on the Vineland Adaptive Behavior Scales indicated age appropriate motor skills, and Ms. McNulty's (UHHS occupational therapist) depiction of kindergarten readiness as "requiring fine motor skills such as cutting and writing your name, the identification of colors, shapes, managing fasteners, and beginning to shoe tie". While Ms. McNulty was reluctant to state the child met this standard due to incomplete progress reports and imperfect recollection, these are skills the Achievement Centers' final summary (and the present levels of performance of the 2003-2004 IEP) identify as

generally within the child's capabilities, with the exception of fastening buttons on his person which has not been thoroughly addressed since the child rarely wears clothing with buttons.

The Achievement Centers' final summary relative to occupational therapy concludes with the statement "...it is strongly recommended that [the child] continue to receive support from occupational therapy at school as well as other therapies to insure that activities are being adapted to best fit his learning style, address his sensory diet needs and establish modifications in the environment as needed".

Julie Peacock is an occupational therapist employed by the Parma City School District; she is a member of the child's IEP team. Although she has never met the child, she has reviewed all documents related to the provision of occupational therapy services to the child, the Peabody Developmental Scales administered September 30, 2002, and had conversations with the occupational therapist at the Achievement Centers on two occasions for a total of approximately 30 to 40 minutes regarding the child's IEP goals and progress. In addition, Ms. Peacock discussed the child with the parent, who expressed concern that no sensory goals were incorporated into the prior year's IEP. In light of the fact she (1) had never seen the child, (2) desired to tailor goals specific to the current abilities of the child, (3) wished to take into [48]consideration any potential difficulties the

child may encounter based on attending a new school and placement in a foreign environment and (4) desired to identify sensory issues based on personally-obtained data, Ms. Peacock recommended that an occupational therapy assessment be conducted at the start of the school year, as part of an overall functional behavior assessment. The occupational therapy assessment was to include a sensory inventory, assessment of fine motor skills and assessment of visual perception needs utilizing the Visual Motor Integration Test and the Motor Free Visual Perception Test. School was scheduled to commence September 2, 2003. The assessment was to be completed not later than September 30, 2003, with goals and objectives prepared based on the data collected.

Preferred practice would suggest that once occupational therapy is established as a needed service, the creation of goals and objectives should not be deferred. Having said this, however, based on the totality of the circumstances, the determination to defer the development of goals and objectives for the proposed 2003-2004 IEP is considered to be a no more than a technical violation. The specific circumstances considered included:

(a) the demeanor and credibility of the witness. Julie Peacock was a vibrant woman who exuded pride in her profession and in her ability

to perform its duties capably. It was clearly her intent to establish the current levels of performance of the child within the scope of his new environment at Pleasant Valley Elementary School and to obtain baseline data to create measurable annual goals designed to meet the child's unique needs. Ohio Model Policies and Procedures (2000) at Section 6, "IEP/LRE", Step 4 (p. 24). She also made salient points with respect to certain areas addressed in the occupational therapy objectives of his 2002-2003 IEP. Ms. Peacock stated it was not uncommon for a child of his approximate age or grade level to require assistance with shoe tying and cutting out shapes. She believed these were things he "should be working on, but he shouldn't actually quite know how to do ... yet". While it would be simple to recycle a goal not yet mastered in the prior IEP and incorporate that goal into the proposed IEP, Ms. Peacock's preference was to address problems that occurred directly as a result of his disability, as opposed to age-related challenges.

(b) the consistency of Ms. Peacock's viewpoint with that contained in the final occupational therapy summary provided by the Achievement Centers, that addresses the need for future services to focus on adaptation of activities to best fit his learning style, sensory diet needs and modifications to the child's environment as needed. Inasmuch as his prior IEP did not incorporate sensory diet needs and his activities and environment would be substantively impacted by his relocation to Pleasant Valley Elementary School, the assessment of the child's abilities and adaptation to his new environment are the most important factors in the creation of appropriate goals and objectives.

c) the time frame involved in developing appropriate goals and objectives and the need for such services. While it is clear the IEP team determined a need to provide occupational therapy services, it is equally apparent the child is age appropriate with respect to the majority of the motor skills required for kindergarten readiness as

defined by various of the witnesses at hearing and as set forth on the TEACCH checklist. This statement is in no way intended to minimize the necessity for provision of services; his 2003 evaluation team report indicates the child would benefit from additional opportunities to practice fine motor skills and visual perceptual tasks needed for school and self- care. It is merely intended to reflect that a diminution of services for an approximate 30-day period in order to complete a comprehensive assessment at the start of the school year should not significantly impact the child's long-term progress in this area. In fact, the overall impact on the child's long-term progress may be greater with the development of goals and objectives based on timely data and tailored to the child's unique needs. Also, Ohio Model Policies and Procedures (2000) at Section 6 "IEP/LRE", Step 5 (p. 27) specify services must start without undue delay; given the circumstances, less than 30 days after the start of school does not seem egregious.

d) the parent's participation in the IEP meeting on June 2, 2003, and her written consent to the initiation of services, except as to LRE.

E) Failure to Provide Music Therapy. Petitioners consider music therapy to be essential to the child's continued success in an educational setting. The Parent Attachment to the 2003- 2004 IEP indicates the child

> "loves music and responds in many situations to rhythm. He will march to an area without resistance.... [The child] can answer Wh questions in music therapy , as well as use 4-5 word appropriate sentences with music. [The child] is greatly motivated with music...."

The Achievement Centers' "Summary of Music Therapy Progress" dated 5-6-2003 corroborates the child's love of music, his responsiveness when music is utilized and his success in answering "wh" questions during the course of music therapy. All children at the Achievement Centers receive 15 minutes of 1:1 instruction in music therapy and 15 minutes consultative services per week; however, music therapy was incorporated into the child's IEP as a related service as a result of anecdotal evidence that indicated the child responded well within the structure of the music setting. On the other hand, testimony elicited from the child's lead teacher, Ms.

Gerber, represented she did not teach the child using music. Ms. Gerber stated that [50]while the child responded well to music, the child "still picked up his skills although I did not sing" (Tr. 450). Ms. Gerber described the child's greatest gains during his second year to be in the area of pre-academic skills.

Under the IDEA, related services are defined as "transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education" 20 U.S.C. § 1401(22). The key word in the definition of related services is "required"; if the service is not required to assist a special needs child to derive benefit from special education, a school district is not obligated to incorporate the service into the child's IEP. Neely v. Rutherford County Sch., 60 F.3d 965, 969 (6th Cir. 1995). Music therapy is recognized as an appropriate related service "where the IEP team... determines that the particular therapy would be necessary for the child to benefit from special education and to receive FAPE." Letter to Farbman, 34 IDELR 7 (OSEP Apr. 5, 2000). Given the testimony of Ms. Gerber, it cannot be said that music therapy constitutes an essential related service for the child. The school district is not obligated to provide music therapy unless the IEP team determines it to be necessary for him to receive an educational benefit. Irving Indep. Sch. Sys. v. Tatro, 468 U.S. 883, 894 (1984). In the

present instances, the facts do not support such a determination.

Although the school district is not required to provide music therapy, it is obvious the district recognizes that music can enhance the educational experience for some special needs children. Mrs. d'Aliberti testified she had utilized song to reinforce lessons for a student who responded well to rhythm. Also, the classroom structure incorporates the use of music, particularly at circle time. Testimony was also provided regarding the adaptive music class taught by Beverly Miller to special needs students on a twice-weekly basis for a total of 70 minutes. Class sizes are small, and the instructor is assisted by two aides. Ms. Miller is not a musical therapist; however, many of the sequences contained in the course content target skills such as following directions, steady beat or rhythm recognition, acknowledgment of visual contact and socialization including proper greeting and closing. Although each child with a disability has unique needs, the majority of these targeted skills represent areas that could potentially benefit this child.

F) Failure to Incorporate the TEACCH Methodology in the Child's IEP. Although the Achievement Centers staff represents that the school does not advocate a single methodology, but rather utilizes a blend of teaching methods in order to tailor the program to the child, the [51]parent credits the TEACCH methodology for the child's success, particularly in the area of pre- academics

where he responded well to the structured nature of the independent work stations and completed assigned tasks regularly. Mrs. d'Aliberti recently attended a two-day workshop on the TEACCH method; in addition, she had previously discussed the methodology with other teachers trained in its usage and conducted independent research on the Internet. As a result, she was confident the concept of work centers as established in her classroom represented the equivalent of a TEACCH environment. Based on the testimony presented, the structure appears strikingly similar.

Ms. Gerber, the child's lead teacher at the Achievement Centers, stated he needs a structured program that includes high motivators; she acknowledged on cross-examination that the child does not require TEACCH per se. A comparably-structured program would also provide an educational benefit.

A review of the child's school-age MFE, at "Implications for instruction and progress monitoring" included the following statements:

> "Consider continuation of the TEACCH methodology for the child's academic learning.
>
> [The child] focuses more in a structured area that is organized with limited auditory and visual distractions."

"To consider" essentially means "to think about carefully, especially with regard to taking some action". Meriam-Webster's Collegiate Dictionary (10th Ed., 1993). It is not a mandate. In the present instance, however, while the methodology label may not be in use in the special education classroom of Mrs. d'Aliberti at Pleasant Valley Elementary School, the defined structure of the work centers and stations is sufficiently analagous to afford the child the desired benefits.

It is also important to recognize in this context that, as a general rule, methodology disputes are left to the discretion of the school district so long as the chosen methodology provides FAPE. Lachman v. Illinois State Bd. of Educ., 853 F2d 290 (7 Cir), *cert. denied* 488 U.S. 925 (1988).

3) Impact of Expert Medical Testimony provided by Dr. Morris Levinsohn.

The testimony of Dr. Morris Levinsohn, the child's pediatric neurologist, formed the linchpin of the petitioners' case in chief. As such, it is sufficiently important to merit a separate [52]discussion. Dr. Levinsohn has had a distinguished career since his graduation from medical school approximately 40 years ago. During the earlier years of his career, i.e., 1975 to 1985, he was involved in a major research project involving a technique of continuous intercranial pressure monitoring that ultimately reduced the national mortality rate from Reyes Syndrome from 90 per

cent to 10 per cent. As a result of this success, Dr. Levinsohn traveled extensively worldwide to present the research data at technical seminars (Tr. 307-308).

In 1985, Dr. Levinsohn developed a particular interest in the neurobehavioral disorders of children, including autism spectrum disorder. Over the past 18 years, Dr. Levinsohn estimates he has seen approximately 2000 patients with autism.

Thus, the doctor's credentials are impressive, his breadth of knowledge in the field of pediatric neurology is obvious, and his opinions are delivered with intelligence, wit and charm. In spite of these factors, the testimony elicited with regard to the educational needs of the child in the case at bar is not compelling.

In a letter dated April 2, 2003, Dr. Levinsohn offered his "very strong medical recommendation that [the child] is clearly in need of a very intensive and comprehensive program to include continued speech, occupational, physical and musical therapy." At hearing, Dr. Levinsohn iterated this recommendation and offered his further opinion that the child required one-on-one instruction in order to be successful. Dr. Levinsohn acknowledged these various recommendations with respect to the educational placement of the child and appropriate related services would represent the absolute "best case program" for the child.

On cross-examination, Dr. Levinsohn was queried as to the underlying bases upon which these recommendations were formulated. Dr. Levinsohn indicated he initially met the child in November, 2000. The initial visit was approximately 90 minutes in length and included a physical and neurological examination, an interview with the parents and a concurrent observation of the child during the interview process. There have been three follow up visits ranging in length from 40 to 60 minutes, with the most recent having occurred on April 2, 2003. In addition, Dr. Levinsohn and the child's mother are employed at the same medical facility. During vacation periods, the child is occasionally present at the hospital; and the doctor has had the opportunity to observe the child while engaged in conversation with the parent for average periods of 15 minutes in duration. [53]The specific recommendations tendered by the doctor with respect to the child's educational program are based solely on information provided by the parents. For example, the doctor has never personally observed the child's reaction to music; rather the parents report the child loves music and it restores some sort of order for him.

Dr. Levinsohn has never observed the child in a classroom setting, nor has he seen the child interact with other children. Dr. Levinsohn acknowledged he is not an educator. He has not reviewed any of the child's educational records, nor has he discussed the child's educational performance with his teachers.

Dr. Levinsohn did not indicate the basis for his recommendation that the child's program incorporate physical therapy. No data have indicated physical therapy to be an essential need of the child.

Plainly stated, the lack of personal knowledge as to the specific needs of the child and the absence of personal observations of the child in an inclusionary educational setting renders the firm medical opinion of Dr. Levinsohn of questionable utility.

Equally interesting and rather surprising is Dr. Levinsohn's recent diagnosis of the child as possessing a disruptive behavior disorder. No new assessments were carried out to establish this diagnosis, no were any such behaviors observed by the physician in his office or on a one-to- one basis with the child. Instead, the diagnosis was predicated on the child's historical profile, information provided by his parents and their "identifying these aggressive behaviors in all domains of functioning in all areas including school and public places".

In light of the willingness of the treating physician to develop a diagnosis on the basis of such subjective data, it is not feasible to attach a high degree of credibility to statements rendered as Dr. Levinsohn's "firm medical opinion". While it is unquestioned that the physician's statements are

made with respect to the best interests of the child, as perceived based on the facts provided to him by the parents, the IDEA does not mandate that an IEP team blindly accept the opinions of outside providers. School districts are merely required to accept information from such professionals and consider that information along with all other data available regarding the needs of the child. Specifically, the IEP team is charged with the responsibility of reviewing all of the data, evaluations, opinions and recommendations placed before them in an attempt to reach a decision by consensus.

[54]In a situation where, as here, the parents' medical expert has never observed the child in a classroom setting and has no substantive personal knowledge to buttress his opinions regarding the appropriate educational programs for the child, the opinions of the educators serving as IEP team members are entitled to be given greater deference than those of Dr. Levinsohn. See e.g., McGovern v. Howard County Pub. Schs., 35 IDELR 153 (Md. 2001). Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. Hartmann v. Loudoun Cty. Bd. Of Educ., 118 F.3d 996 at 1001 (9th Cir. 1997).

D. Petitioners' Entitlement to Relief Requested.

Petitioners seek a determination that the proposed 2003-2004 IEP offered by the Parma City School District did not comport with the requirements of the IDEA and, as such, was not designed to confer educational benefit on the child. When a school district has failed to offer a free appropriate public education, the parents may seek reimbursement for their private placement of the child at an alternate facility so long as a determination is made that the public placement violated the IDEA and the private school placement was proper under the Act. School Comm. of Burlington, Mass. V. Dept. of Ed. of Mass., 471 U.S. 359, 373-374 (1985).

I do not find that to be the case here. As indicated in Sections B and C above, the IEP proposed by the school district substantially complied with the requirements of the IDEA in that it contained a timely offer of a free appropriate public education of the child prior to enrollment as a school-age child. 34 C.F.R. § 300.403(a). As previously discussed, in order to provide a FAPE, a district is required to offer a student with a disability an individualized program of special education, designed to meet the student's unique needs in accordance with a properly developed IEP. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). A school district meets its obligations to provide a FAPE if it has (a) complied with the procedural requirements of the IDEA, and (b) developed an IEP which is reasonably calculated to provide an educational benefit. Id. at 206-207.

Having concluded that a FAPE was offered to the child, it is not necessary to review the program offered at the [Private] School to determine whether it constitutes an appropriate private placement, nor to address the issue of tuition reimbursement.

[55]Respectfully submitted,

Joy M. Freda, S.C. Regis. No. 0024718
Impartial Hearing Officer
6009 Landerhaven Drive, Suite C-1
Cleveland, Ohio 44124-4192
(440) 461-3600

Dated: February 19, 2004

NOTICE OF OPPORTUNITY FOR APPEAL AND RIGHTS FOLLOWING THE HEARING

1. You can request a verbatim transcript of the hearing.

2. Appeal Rights: If you are not satisfied with the findings and decision of the impartial hearing officer, you may appeal such a decision to the State Board of Education within forty-five (45) days of notice of the decision to the State Board of Education. If

an appeal is filed, the Office for Exceptional Children, on behalf of the Department of Education, will appoint a review officer to review the decision and issue a final order. The address for appeal is:

State Board of Education
c/o Office for Exceptional Children
25 South Front Street, Mail Stop 202
Columbus, Ohio 43215
(614) 466-2650

3. **Appeal Rights after a State Level Review:** If you are not satisfied with the final order of the state level review officer, you may appeal such order within forty-five (45) days of receipt of notice of the order to:

the Court of Common Pleas of the county in which the child's school district of residence is located, under Chapter 119 of the Ohio Revised Code;

OR

You may file an appeal with the federal district court of competent jurisdiction.

Joy M. Freda
Impartial Hearing Officer

[56]CERTIFICATE OF SERVICE

A copy of the foregoing decision was forwarded by e-mail transmission to Arron K. Gregory at Arron.Gregory@ode.state.oh.us on this 20th day of February 2004.

The foregoing decision was officially served on Christina Henagen Peer of Squire, Sanders & Dempsey L.L.P., attorneys for the Parma City School District, at 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114-1304, by courier delivery (with signature requested) on the 20th day of February 2004. Identical service was attempted on Dr.Donald Menefee, attorney for the parents at 22408 Lake Shore Boulevard, Euclid, Ohio 44123, but was not successful. Thereafter, Dr. Menefee was served by certified mail, return receipt requested, at 22408 Lake Shore Boulevard, Euclid, Ohio 44123 by depositing in the U.S. mail on February 20, 2004.

The original of the decision, together with Appendix I, "Hearing Officer Exhibits", the transcript and the due process hearing exhibits, will transmitted to the State of Ohio, Department of Education, c/o Office for Exceptional Children, 25 South Front Street, Mail Stop 202, Columbus, OH 43215, Attention Arron K. Gregory, Educational Consultant, by United Parcel Service on or before the 20th day of February 2004.

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Joy M. Freda
Impartial Hearing Officer